

No. 15886 ✓

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**United States  
Court of Appeals**  
for the Ninth Circuit

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DIXIE TANK & BRIDGE CO., a Corporation,  
Appellant,

vs.

COUNTY OF ORANGE, a County of the State of  
California, and WILLIS H. WARNER,  
Appellees.

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**Transcript of Record**

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**Appeal from the United States District Court for the  
Southern District of California  
Central Division**

**FILED**

AUG - 4 1958



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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## NAMES AND ADDRESSES OF ATTORNEYS

### For Appellant:

JAMES C. R. McCALL,  
3325 Wilshire Boulevard,  
Los Angeles 5, California.

### For Appellees:

JOEL E. OGLE,  
County Counsel;

STEPHEN K. TAMURA,  
Assistant;

ADRIAN KUYPER,  
Deputy,  
308 Hall of Records,  
Santa Ana, California.





In the United States District Court, for the Southern District of California, Central Division

No. 597-57 Y

DIXIE TANK & BRIDGE CO., a Corporation,  
Plaintiff,

vs.

COUNTY OF ORANGE, a County of the State of California; and WILLIS H. WARNER,  
Defendants.

### COMPLAINT

(For Money, to Enforce Mechanic's Lien  
and Declaratory Relief)

Comes plaintiff above named and for cause of action against the defendants alleges:

#### I.

That jurisdiction of this action rests on Title 40, U.S. Code Sec. 1332, Subsection (a) (1).

#### II.

That at all times mentioned herein, plaintiff Dixie Tank & Bridge Co., was, and now is, a corporation duly organized and existing under and by virtue of the laws of the State of Tennessee, with its office and principal place of business at Memphis, Tennessee; and is a citizen of Tennessee. That at all times mentioned herein, plaintiff was, and now is,

a duly licensed general contractor under the laws of the State of California. [2\*]

### III.

That at all times mentioned herein, the defendant County of Orange was, and now is, duly established and organized as a County, under the laws of, and within, the State of California. That defendant Willis H. Warner, at all such times, was and now is the Chairman of the Board of Supervisors of said County. That both of said defendants are citizens of the State of California.

### IV.

That in the year 1956, plaintiff and the defendant County entered into three agreements in writing, whereby plaintiff agreed to furnish the material and labor necessary therefor, and to clean, paint and repair the 100,000 gallon elevated water tank of the defendant County, located at the Orange County General Hospital operated by the defendant County, and situated at or near the Town of Orange, within said County, upon the lands hereinafter described, and whereby the defendant County agreed to pay plaintiff therefor the total sum of \$7,511.60, upon completion of said work. That said work was reasonably and necessarily divided into two or more work projects and orders, because the necessary repairs to said tank, especially the amount of welding necessary to make the same water tight could not be determined until after the cleaning and

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\*Page numbering appearing at foot of page of original Certified Transcript of Record.

scaling thereof had been completed. That the separate work projects or orders involved therein, and the agreed price for each, were contracted for as follows:

(1) On August 28, 1956, the Board of Supervisors of said County unanimously authorized the Purchasing Agent of said County to arrange for the repair of said tank at an estimated cost of \$6,500.00 as provided in Requisition No. M2946A. The Purchasing Agent duly solicited bids from qualified contractors, including plaintiff, pursuant to this authority; and duly reported plaintiff's bid as the lowest received in response to such invitation.

(2) On October 2, 1956, the Board of Supervisors duly met [3] and unanimously authorized its Chairman aforesaid to sign for said County a contract with plaintiff obligating plaintiff to clean and paint said tank for a price of \$1,850.00, a copy of which is hereto attached, marked Exhibit "A" and incorporated herein in full by this reference; and pursuant thereto, said contract was thereupon duly signed by plaintiff and by the defendant County acting through said Chairman.

(3) On October 5, 1956, Erma Graham, Acting Purchasing Agent of said County, by authority of the Board of Supervisors, granted on August 28, 1956, as foresaid, issued to plaintiff the County's Order No. 62659, whereby (in addition to the cleaning and painting covered by the contract Exhibit "A" hereto) the County employed plaintiff to

tighten and adjust all loose sway rods and to replace catwalk plates where necessary, for a price of \$1,000.00, as a part of said work. That a copy of said Order No. 62659 is hereto attached, marked Exhibit "B" and incorporated herein in full by this reference. (The issuance of said work order was ratified by the Board of Supervisors on November 7, 1956, as next shown).

(4) Plaintiff duly cleaned the tank, which revealed that to render the tank water tight would require the welding of 3616 rusted out rivets and 712 lineal feet of seams, the price of which work, as set forth in plaintiff's bid aforesaid and in Order No. 62659 aforesaid, was 60c each for welding the rivets and \$3.50 per lineal foot for the seam welding, making the total price for welding of both rivets and seams \$4,661.60. On November 7, 1956, with knowledge of all the foregoing, the Board of Supervisors met and unanimously authorized the Purchasing Agent to spend \$1,011.60 additional to the \$6,500.00 authorized on August 28, 1956, to complete said work; and authorized its Chairman to enter into a contract with plaintiff for said welding, a copy of which is hereto attached, marked Exhibit "C" and incorporated herein in full by this reference, and pursuant to such authority, plaintiff, acting through its agent, [4] and the defendant County, acting through said Chairman, on November 7, 1956, signed said contract for said work. This contract (Exhibit "C"), together with the contracts set forth in Exhibits "A" and "B" hereto total \$7,511.60. [5]

5. On November 13, 1956, Courtney R. Chandler, purchasing agent of said County, issued to plaintiff a change order for \$1011.60 additional to the \$6500.00 estimate, pursuant to the aforesaid authorizations from the Board of Supervisors dated August 28, 1956 and November 7, 1956; and a copy of said change order is hereto attached, marked "Exhibit D" and incorporated herein in full by this reference.

That copies of the minutes of the Board of Supervisors relating to said work projects are consolidated into the paper which is attached hereto, marked "Exhibit E" and incorporated herein in full by this reference.

#### IV.

That plaintiff began the work called for by said written agreements aforesaid, on or about October 5, 1956, and completed the same on November 21, 1956, when the same was accepted and approved by the said County's agent and representative in charge of said work, and the plaintiff fully kept and performed all the terms and conditions thereof on its part to be performed, and has offered, and now offers, to issue its standard form of warranty and guarantee (provided for in clause 4 of the contract dated October 2, 1956) covering the maintenance of said tank for a period of twelve years from date, upon condition that defendant County pay its just claim for said work in the sum of \$7,511.60.



## V.

That on November 24, 1956, plaintiff filed with and presented to the Board of Supervisors of said County its claim for the \$7,511.60 due plaintiff as the total price of said three work projects, but said Board has failed and refused for more than ninety days since said date to approve said claim, and the same has been rejected in full by said Board, and no part of said sum has been paid to plaintiff.

## VI.

That as part of the aforesaid contracts between plaintiff [6] and defendant County dated October 2 and November 7, 1956, defendant Willis H. Warner covenanted with plaintiff that he was fully authorized and empowered to sign, execute and deliver said contracts to plaintiff on behalf of said County and that all legal requirements precedent thereto had been fully complied with, and plaintiff relied thereon.

## VII.

That plaintiff is informed and believes that one, more or all of said written agreements covering said work projects are claimed by the defendant County to be void and unenforceable on the alleged ground that they covered only one indivisible work project, and were not entered into pursuant to advertisement for bids, contrary to Sections 25450 and 25452 of the Government Code of California. Plaintiff is informed, believes, and respectfully represents that said written agreements were validly entered

into and are enforceable against said defendant County; and that to the extent, if any, that they may be not so enforceable, defendant Willis H. Warner is personally liable to plaintiff for breach of his aforesaid covenant.

### VIII.

That upon presentation of plaintiff's claim on November 24, 1956, the defendant County, acting by and through its Purchasing Agent, demanded of plaintiff that plaintiff itemize the cost to plaintiff of the material, supplies and labor used in performing said work, as a condition precedent to allowance of said claim by the Board of Supervisors, which demand is an unreasonable and unlawful requirement, as plaintiff is informed and believes and states.

### IX.

That the land upon said tank was so cleaned, repaired and painted under said agreements is described as follows, to wit:

A parcel of land situated in the County of Orange, State of California, known as the Orange County General Hospital Tract, formerly known as 12071 Santa Ana Boulevard, near the City of Orange, California, consisting of [7] about 10 acres, more or less, and occupied by the Orange County General Hospital, at the southwest corner of Placentia and West Chapman Streets.

That the whole thereof is required for the convenient use and occupation of said premises.

## X.

That at all times mentioned herein the defendant County was the owner and reputed owner of said land and of the buildings and the water tank erected thereon.

## XI.

That on February 7, 1957, plaintiff filed for record in the office of the County Recorder of said County of Orange, its claim and notice of lien in writing, duly verified, a copy of which is attached hereto, marked "Exhibit F" and made a part hereof; and which said claim and notice was thereafter on the same day duly recorded in said office in Book 3796, Page 334 of Official Records of Orange County, California. That plaintiff paid \$2.50 for verifying and recording said lien.

## Second Cause of Action

For a Further, Separate and Distinct Cause of Action,

Plaintiff incorporates herein, by this reference, all of the allegations of the First Cause of Action, *supra*, except paragraph III thereof, and in place and stead of said paragraph alleges:

## I.

That on and between October 2, 1956 and November 21, 1956, at the special instance and request of defendant County of Orange, and upon its promise to pay, made through its duly authorized representatives, to wit, the Board of Supervisors, the



Chairman of said Board, and the Purchasing Agent of said County, the reasonable value thereof, plaintiff furnished and performed work and labor and materials necessary for the cleaning, painting and repair of [8] the 100,000 gallon elevated water tank of the defendant County, situated on the premises known as the Orange County General Hospital Tract, which labor and material were furnished to be used, and were used, in said work; and that said labor and materials were of the reasonable worth and value of \$7,511.60, no part of which has been paid.

Wherefore, plaintiff demands judgment as follows:

1. Against the defendant County of Orange and the Defendant Willis H. Warner, in the sum of \$7,511.60, together with interest thereon at the rate of seven per cent per annum from November 24, 1956, and for plaintiff's costs, including reasonable attorney's fees, and the sum of \$2.50 for filing and recording the lien notice aforesaid; and that the premises hereinabove described may be sold and the proceeds thereof applied to the payment of said judgment, interest and costs.

2. That the Court decree and declare whether, and to what extent, if any, the written agreements for the work aforesaid are invalid under Sections 25450 and 25452 of the Government Code of the State of California, and whether defendant is required by Sections 29700 and/or 25458 to itemize its costs of labor and material as a condition precedent

to allowance of all or any part of plaintiff's claim by the Board of Supervisors of the defendant county; and

3. For all such other, further and different relief as the Court deems just in the premises.

/s/ JAMES C. R. McCALL,  
Attorney for Plaintiff. [9]

## EXHIBIT A

Form 4-C

Dixie Tank & Bridge Company  
Memphis, Tennessee

Contract for Cleaning, Scaling, Inspecting  
and Painting

This contract entered into for emergency repairs by and between Board of Trustees (Authorized Agent) County of Orange Hospital County Purchasing Department hereinafter known as First Party and the Dixie Tank & Bridge Company, Memphis, Tennessee, hereinafter known as the Company.

Witnesseth:

1. The Company agrees to do the following described work for First Party on its 100,000 gallon elevated water tank located at Orange, California, to wit:

1 a.—Company will rig, clean and scale the inside of the tank, so inspection can be made together

with the inspectors of First Party to determine what, if any, repairs are necessary, First Party shall furnish electric current to perform work. Company shall have the right to install outlets in the tank for ventilation and cleaning purposes at our prevailing prices.

1 b.—Company will furnish all labor and material to paint the interior of said tank with one (1) coat of Dixie Asphalt Tank Reliner. This paint will pass Federal Government Board of Health tests as being tasteless and non-poisonous, will expand and contract with heat or cold, will not chip, crack or peel, and will resist electrolysis, alkaline, iron or other minerals that are in the water. Water can be put in tank 24 hours after painting. The inside or under side of roof and spider rods are to be painted with exterior paint, one primer coat and one finish coat.

1 c.—Company will remove all loose rust and paint from exterior of tank, apply one (1) spot coat to all bare metal, and apply one (1) complete coat of paint to the exterior of tank, tower, riserpipe, all from the foundation up. All exterior paint is to be furnished by the Company. For the above the Total sum of \$1850.00 (One thousand eight hundred fifty dollars).

2. After tank has been inspected, Company will submit a flat sum bid for all such repairs as may be necessary. This bid will be submitted to First Party and a written repair contract embodying the specific work to be done, and the entire price to be paid,

shall be entered into by the Company and First Party before any repair work is done.

3 a.—Company will notify First Party as soon as the Company can conveniently do so of the date work under the contract will commence. However, such notice may be given by Company crew when it arrives to perform the work, and this, it is specifically agreed, shall be sufficient notice.

3 b.—First Party agrees to drain tank within twenty-four (24) hours after being notified that crew has arrived.

4. If all repairs, replacements, etc. as recommended by Company's inspectors are made and payment for the work performed is received by the Company then the Company warrants or guarantees all repair work in the performance of this contract under the provisions of the Company's Standard Form of Warranty or Guarantee. This warranty or guarantee shall extend for a period of twelve (12) years from the date the repairs under this contract are completed, provided the outside and inside of said tank is painted by the Company at the expiration of three (3) years from the date of such repairs with Dixie Asphalt Tankreliner, or paint of equal quality approved by the Company, and the outside painted with first-grade paint of any reliable paint manufacturer. The Company warrants the painting (both inside and outside) for a period of three (3) years from the date the painting is completed if the repairs as authorized by the Company are made or in the

event Company's inspection reveals that no repairs are necessary.

As a part of this warranty or guarantee and of this contract, the Company agrees to make necessary adjustments thereto, without cost or obligation to the First Party, from the date of completion of the work under this contract, and such warranty or guarantee will continue for another three (3) years in the event the Company shall re-paint said tank at the expiration of three (3) years from the completion of the work done under this contract at the Company's prevalent prices at that time; otherwise the guarantee on the painting and repairs will become null and void.

5 a.—If the repairs are not done as agreed upon in this contract or in the proposal of the Company to the First Party, then the provision with reference to the warranty or guarantee shall be inoperative and the Company shall not be responsible for any leaks in the tank, or for the structural soundness of the tank, and the First Party agrees to sign the Company's Standard Form of Release of Liability and warranty or guarantee. It is agreed that if company decides not to do the painting first party shall pay the company one-third of the contract price as set out in paragraph 1c.

5 b.—Company agrees that First Party shall have a period of three (3) days after being notified crew has arrived in which to make arrangements for First Party's inspector and to decide upon repair contract or other matters that may arise.



6. First Party has a right to have an inspector in the tank at all times, or whenever it is convenient for them to do so. It is agreed that the Company will correct any defects that shall arise while work is in progress. As pointed out by first party inspector as outlined in this contract. These defects and adjustments shall be made without any further cost to first party.

7. The Company agrees to furnish all necessary tools and equipment, and agrees to carry full coverage of Workmen's Compensation and Contractor's Public Liability Insurance, and agrees to furnish verification to the First Party that such insurance policies are in force and effect if the First Party shall request it. First Party agrees to make all arrangements for the Company to have entrance, parking and ground space for equipment and men to do the above described work at the tank.

8. The First Party shall pay to the Company, upon completion of the work agreed to be performed, the total of the sums set out in paragraph 1c of this contract, which shall be in full for all work performed and agreed to be performed by the Company under this contract.

9. The Company and all workmen employed by the Company shall conduct all operations in a clean and sanitary manner. No nuisance shall be committed in a tank; the workmen shall either use proper waste receptacles or leave the tank whenever necessity arises. First Party shall report any disorderly

conduct of the foreman and men by collect telegram to the Memphis Office and the Company shall remove them immediately upon such notification.

No one shall work in a tank if he has been under a physician's care, or has needed a physician's care, within a seven-day period prior to entering or working in the tank. No personnel shall be permitted to work in a tank who has an abnormal temperature or gives evidence of illness. The First Party, physician employed by him, shall be the judge of the physical fitness or unfitness of any person to enter or work in a tank. No deviation from this stipulation may be permitted.

The First Party, after work of any nature is done in a tank, is charged with satisfying himself that the tank interior is clean and sanitary before the tank is returned to service. Although the Company may be required by its contract to clean tank thoroughly before a tank is restored to service, it is the ultimate responsibility of the First Party either to give the tank a final field inspection or to require such laboratory tests of the quality of water held (for test purposes) in the tank as will demonstrate the good sanitary condition of the tank interior. If work is done to the entire satisfaction of the First Party, First Party shall give the Company a letter or recommendation to that effect. If not First Party is to notify the Company by collect telegram at their Memphis, Tennessee, Office and Company will see that all work is done to First Party's entire satisfaction as per contract.

The Company shall keep the premises clean and shall remove all trash and used materials placed there by the Company during the performance of this contract.

10. Parties signing this contract in behalf of First Party covenant and agree that they are fully authorized and empowered to sign, seal, deliver and execute the same and that all legal requirements have been fully complied with.

11. No verbal agreements or representations not incorporated in this contract shall be binding on either party as this contract contains the entire agreement.

DIXIE TANK & BRIDGE CO.,  
By OFFICE.

This contract must be countersigned by W. A. Riley or E. H. Riley before it is binding on the Company.

/s/ W. A. RILEY,  
President.

Dated this 21st day of September, A. D., 1956.

COUNTY OF ORANGE  
HOSPITAL,

By /s/ WILLIS H. WARNER,  
Chairman, Orange County  
Board of Supervisors.

Dated this 2nd day of October, A. D. 1956. [10]



EXHIBIT B

County of Orange  
Purchase Order

Order No. 62659

To: Dixie Tank & Bridge Company,  
P. O. Box 1,  
Memphis 1, Tennessee.

Santa Ana, Calif., Oct. 5, 1956

Please Furnish the Following to County of Orange

Ship To:

County of Orange Hospital,  
Maintenance Department,  
12071 Santa Ana Blvd.,  
Orange, California.

Fund: Hospital.

Via Rasmussen

If unable to fill Order exactly in accordance with description,  
unit and price hereon, ask Purchasing Agent for instructions.

Labor and material necessary to repair 100,000 gallon high tank,  
as per agreement on file in County Clerk's office, as follows:

Rig, scale and clean inside of tank with scaling machines to clean metal.....	Unit Price	Extension
		\$550.00
Weld all rusted out rivets. (Unit: ea.).....	\$ .60	
Weld all deteriorated seams. (Unit: per lin. ft.) .....	3.50	
Weld all pits in tank plates that are over halfway through tank plates. (Unit: ea.)..	.60	
Tighten and adjust all loose sway rods.....		150.00
Prime and reline interior of tank. ....		650.00
Remove loose rust and paint from exterior of tank and tower, and spot prime and repaint exterior of tower and tank. ....		650.00
Replace catwalk plates where necessary. ....		850.00

Your state contractor's license No. 110607.

This order is not valid until Labor and Materials Bond covering one-half of the total cost of completed job is filed with the County Purchasing Agent (Government Code Section #4200 of the State of California).

Contractor is to supply all insurance, licenses, permits and fees necessary to complete job.

Bid No. : 6933

-----  
Purchasing Agent.

/s/ ERMA GRAHAM,  
Acting P. A.

## EXHIBIT C

Form 5-C

Dixie Tank & Bridge Company  
Memphis, Tennessee

Standard Form of Contract For Emergency Repairs  
(For use in all States)

This Contract entered into for emergency repairs to water tanks, by and between Authorized Agent County of Orange Hospital Purchasing Dept, hereinafter known as First Party, and the Dixie Tank & Bridge Company, Memphis, Tennessee, hereinafter known as the Company,

Witnesseth:

It is agreed that any and all contracts between the First Party and the Company prior to the date of

this contract are merged into this contract, and this contract supersedes all previous agreements between the parties and is the sole contract between the First Party and the Company.

### Inspection

It is understood and agreed between the parties that a thorough inspection has been made of the tank belonging to the First Party and located at Orange Calif. (excluding the footings or foundation of the tank) and that the repairs outlined in the following paragraphs have been agreed upon by the parties as being necessary and essential.

1-(a)—It is understood and agreed between the parties that the Company shall do the following repair work and painting upon said tank for the price hereinafter stated:

Total amount of lineal feet of flat welding: .....	26
--	----

Total amount of lineal feet of vertical welding: .....	152
--	-----

Total amount of lineal feet of fingers to be welded in bottom .....	180
---	-----

Total amount of lineal feet of horizontal welding: .....	354
--	-----

Total amount of rivets to be welded:....	3616
--	------

Total amount of pits to be welded:.....	none
---	------

## Repairs

Tightening of rods, new steel, etc., or any miscellaneous list below:

Scale clean and paint interior and exterior of tank adjust all sway rods, Repair catwalk floor.

## Painting

1-(b)—The Company shall paint the interior of said tank with one (1) coat of Dixie Asphalt Tank Reliner, and also insulate seams and rivet heads on inside of tank. This paint will pass Federal Government Board of Health tests as being tasteless and non-poisonous; will expand and contract with heat or cold; will not chip, crack or peel, and will resist electrolysis, alkaline, iron and other minerals that are in the water. Water can be put in tank 24 hours after painting. The inside or under side of roof and spider rods are to be painted with exterior paints, one primer coat and one finish coat.

1-(c)—The Company shall paint the exterior of the tank, tower, riserpipe, all from the foundation up, with one (1) spot coat and one (1) finish coat of paint. (All exterior paint is to be furnished by the Company. First Party agrees to block off streets, alleys or other areas to prevent automobiles from parking where they might become damaged from falling paint.)

## Materials

1-(d)—The Company agrees to furnish all labor, welding rods, and interior paint, necessary under

this contract. The First Party agrees to furnish all electric current necessary to perform this contract, and also to furnish replacement steel, exterior paint, and all other materials necessary to perform this contract; but all of such materials which are to be furnished by the First Party shall be subject to approval as to quality by the Company.

### Payment

2—The First Party shall pay to the company, upon completion of the work agreed to be performed, the sum of \$7,511.60, which shall be in full for all work performed and agreed to be performed by the Company under this contract.

### Inspection

3—The Company specifically requests the First Party to have its inspector in the tank at all times while work is in progress, and First Party agrees to notify the Company of any defects in workmanship and if any such defects shall arise while the work is in progress, or during the period of the guarantee hereinafter mentioned; and the Company agrees to make all proper adjustments within a reasonable length of time after such notice, all such proper adjustments to be without cost from the Company.

### Outlets

4—It is agreed that the Company shall have the right to install outlets in the tank for ventilation or cleaning purposes. [12]

### Cathodic Device

5—In the event a cathodic or electrolytic device is installed in the tank after the repairs are made and while the warranty and provisions of the contract shall be in force, then the installation of such device shall terminate the guarantee, and shall operate to release the Company from any further liability by reason of this contract.

### Insurance

6—The Company agrees to furnish all necessary tools and equipment, and agrees to carry full coverage of Workmen's Compensation and Contractor's Public Liability Insurance, and agrees to furnish verification to the First Party that such insurance policies are in force and effect if the First Party shall request it.

### Premises

7—The First Party agrees to make all arrangements for the Company to have entrance to the premises and ample ground space for its equipment and men to do the above described work, at the location of the tank.

The Company and all workmen employed by the Company shall conduct all operations in a clean and sanitary manner. No nuisance shall be committed in a tank; the workmen shall either use proper waste receptacles or leave the tank whenever necessity arises. First Party shall report any disorderly



conduct of the foreman and men by collect telegram to the Memphis Office and the Company shall remove them immediately upon such notification.

No one shall work in a tank if he has been under a physician's care, or has needed a physician's care, within a seven-day period prior to entering or working in the tank. No personnel shall be permitted to work in a tank, who has an abnormal temperature or gives evidence of illness. The First Party, physician employed by him, shall be the judge of the physical fitness or unfitness of any person to enter or work in a tank. No deviation from this stipulation may be permitted.

The First Party, after work of any nature is done in a tank, is charged with satisfying himself that the tank interior is clean and sanitary before the tank is returned to service. Although the Company may be required by its contract to clean tank thoroughly before a tank is restored to service, it is the ultimate responsibility of the First Party either to give the tank a final field inspection or to require such laboratory tests of the quality of water held (for test purposes) in the tank as will demonstrate the good sanitary condition of the tank interior. If work is done to the entire satisfaction of First Party, First Party shall give the Company a letter of recommendation to that effect. If not First Party is to notify the Company by collect telegram at their Memphis, Tennessee Office and Company will see that all work is done to First Party's entire satisfaction as per contract.

The Company shall keep the premises clean and shall remove all trash and used materials placed there by the Company during the performance of this contract.

### Guarantee or Warranty

8—The Company upon payment for the work performed under this contract being received at Company's Memphis, Tennessee Office will issue its Standard Form of Warranty warranting all repair work and painting in the performance of this contract under the provisions of the Company's Standard Form of Warranty. No warranty will be issued and no warranty or guarantee shall be binding upon Company until full payment under this contract is received by Company at its Memphis, Tennessee Office. The guarantee on the painting of the inside and outside shall be for a period of three (3) years and the guarantee on the repair work shall be for twelve (12) years from the date the repairs under this contract are completed, provided First Party pays the Company the prevalent prices of the Company at that time for labor and material for painting of said tank, inside and outside, at the expiration of the guarantee on the painting. If Company does not re-paint tank as outlined above, the guarantee on the repairs and painting will become null and void.

As a part of this warranty or guarantee and of this contract, the Company agrees to make necessary adjustments thereto, without cost from the



Company to the First Party, and such warranty will continue for another three (3) years in the event the Company shall re-paint said tank at the expiration of three (3) years from the completion of the work done under this contract as outlined above.

### Release of Warranty

9—If the repairs and painting are not done as agreed upon in this contract or in the proposal of the Company to the First Party, then the provision with reference to the warranty or guarantee shall be inoperative and the Company shall not be responsible for any leaks in the tank, or for the structural soundness of the tank, and the First Party agrees to sign the Company's Standard Form of Release of Liability and warranty or guarantee.

First Party further agrees to drain tank and make the same available for work of adjustment crew, within 24 hours after notification by Company adjustment crew has arrived to make adjustments as reported by First Party, and failure to do so shall forthwith effect a cancellation of this guarantee of this contract and of the warranty.

### Waiting Time Penalty

10—It is agreed that the First Party shall pay the Company at the rate of thirty (\$30.00) dollars per crew hour for any delays or waiting time including waiting for payment after work is completed or other delays which may be caused by the First Party, which shall be in addition to the sum

set forth in paragraph (2). Waiting time is to be computed at the rate of eight (8) hours per day out of every twenty-four (24) hours as defined by a calendar day. Such waiting time is not to be effective for eight (8) hours after the Company has notified the First Party that the crew is ready to start work or has completed work. However, this waiting time clause shall become effective within eight (8) hours after the First Party has been notified the crew is ready to work or has completed work if any delay is then caused by the First Party.

### Tank Foundation

11—It is understood and agreed by the parties that no inspection has been made by the Company of the concrete footings foundation or building that tank may rest on, and no work whatever has been done thereon by the Company, and any defects therein—either latent or patent—are expressly excluded from the provisions of this contract and warranty and are the sole responsibility of the First Party. Company does not guarantee the riser pipe or frost jacket or tank, or any of its work done to riser pipe or frost jacket, including the expansion joint, even though Company makes repairs to or installs new riser pipe or frost jacket; as Company is not protected against possibility of First Party failing to take necessary precautions in freezing weather and other factors over which Company has no control.

12—The party or parties signing this contract on behalf of the First Party covenant and agree that

they are fully authorized and empowered to sign, execute and deliver the same, and that all legal requirements have been fully complied with.

13—No verbal agreements or representations, not incorporated in this contract, shall be binding on either party, as this contract contains the entire agreement. It is agreed that any construction of this contract shall be governed by the laws of Tennessee.

By /s/ WILLIS H. WARNER,  
Chairman, Orange County  
Board of Supervisors.

Dated this 7th day of Nov., A.D., 1956.

Attest:

L. B. WALLACE,  
County Clerk and Ex-Officio Clerk of the Board of  
Supervisors.

By /s/ MABEL L. CASTEIX,  
Deputy Clerk.

DIXIE TANK & BRIDGE CO.

By /s/ C. A. LINDSEY,  
Authorized Agent.

This contract must be countersigned by W. A. Riley or E. H. Riley before it is binding on the Company.

.....

Dated this..... day of..... A.D., 19....

## EXHIBIT D

County of Orange  
Change or Cancellation of Purchase Order

Date: November 13, 1956.

To: Dixie Tank & Bridge Company,  
P. O. Box 1,  
Memphis 1, Tennessee.

Order No.: 62659—10/5/56  
Department: Hospital.  
Dept. Req. No.: M2046A.

Note the Following Changes:

Please add the following to the above listed order:

Additional labor and material necessary to repair 100,000 gallon high tank .....	1,011.60
--	----------

[Longhand in margin]: Signed agreement following.

[Stamped]: Confirming. [13]

COURTNEY R. CHANDLER,  
Purchasing Agent;

By /s/ ERMA GRAHAM.

EXHIBIT E

A regular meeting of the Board of Supervisors of Orange County, California, was held August 28, 1956, at 9:30 a.m. The following named members being present: Willis H. Warner, Chairman, C. M. Featherly, Ralph J. McFadden, Wm. H. Hirstein, Heinz Kaiser and the Clerk.

In Re: Repair High Tank—Orange County Hospital

On motion of Supervisor Kaiser, duly seconded and unanimously carried, the Purchasing Agent was authorized to arrange for the repair of the high tank at the Orange County Hospital as requested by R. D. Powell, Orange County Hospital Director. Estimated cost per Requisition No. M2946A is \$6,500.00.

A regular meeting of the Board of Supervisors of Orange County, California, was held October 2, 1956, at 9:30 a.m. The following named members being present: Willis H. Warner, Chairman, C. M. Featherly, Wm. H. Hirstein, Heinz Kaiser and the Clerk. Absent: Ralph J. McFadden.

In Re: Contract—Cleaning, Scaling, Repairing, etc., Water Tank—Orange County Hospital

On motion of Supervisor Kaiser, duly seconded and unanimously carried by Board members present, the contract dated October 2, 1956, with the

Dixie Tank & Bridge Co., for the cleaning, scaling, repairing, etc., the 100,000 gallon water tank at the Orange County Hospital was approved and the Chairman was authorized to sign such contract.

A regular meeting of the Board of Supervisors of Orange County, California, was held November 7, 1956, at 9:30 a.m. The following named members being present: Willis H. Warner, Chairman, C. M. Featherly, Ralph J. McFadden, Wm. H. Hirstein, Heinz Kaiser and the Clerk.

In Re: Contract for Emergency Repairs—Repair  
High Water Tank Orange County Hospital  
—Dixie Tank and Bridge Company

On motion of Supervisor Kaiser, duly seconded and unanimously carried, the Chairman was authorized to sign the contract with Dixie Tank and Bridge Company for the repair of the High Water Tank at the Orange County Hospital, in the amount of \$7511.60.

A regular meeting of the Board of Supervisors of Orange County, California, was held November 7, 1956, at 9:30 a.m. The following named members being present: Willis H. Warner, Chairman, C. M. Featherly, Ralph J. McFadden, Wm. H. Hirstein, Heinz Kaiser and the Clerk.

In Re: Additional Amount—Labor and Material—  
High Water Tank—County Hospital

On motion of Supervisor Hirstein, duly seconded and unanimously carried, the Purchasing Agent



was authorized an additional amount of \$1,011.60, covering labor and material necessary to repair high water tank, 100,000-gallons, at the County Hospital.

Original minute order dated October 2, 1956. [14]

## EXHIBIT F

17066

### Mechanic's Lien

Notice Is Hereby Given: That Dixie Tank & Bridge Co., a corporation under Chapter II of Title IV of Part III of the California Code of Civil Procedure, claims a lien upon the parcel of land situate in the County of Orange, State of California, and upon the buildings situate thereon, which land is described as follows, to wit: the Orange County General Hospital tract, formerly known as 12071 Santa Ana Boulevard (or street), near the City of Orange, California, and which premises, claimant is informed and believes, is described as the tract of about 10 acres more or less occupied by the Orange County General Hospital at southwest corner of Placentia and West Chapman Streets, including elevated water tank thereon, as per map recorded in Book .... at Page .... of Records of ..... County, California.



Said Lien is claimed for labor and material for cleaning, painting and repairing the elevated water tank aforesaid, done and furnished at the request of Orange County Board of Supervisors, Orange County Purchasing Agent, and Board of Hospital Commissioners, for and used in the work of improvement of said tank between the second day of October, 1956, and the 21st day of November, 1956.

That the amount due claimant and unpaid on account of said contract, after deducting all just credits and offsets, is the sum of \$7,511.60, with interest from November 24, 1956.

That the County of Orange, a subdivision of the State of California, is the reputed owner of said buildings, premises and tank.

Dated this 1st day of February, 1957.

DIXIE TANK & BRIDGE CO.,

By /s/ W. A. RILEY,  
President.

(Verification for other than Individual Claim)

State of Tennessee,  
County of Shelby—ss.

W. A. Riley being first duly sworn, deposes and says:

That Dixie Tank & Bridge Co. the Claimant herein, is a corporation organized in State of Tennessee, that affiant is the president of said corpora-

tion and for that reason he makes his affidavit on behalf of said corporation that he has read the same and knows the contents thereof, and that the statements therein contained are true; and that it contains, among other things, a correct statement of the demand of Claimant, after deducting all just credits and offsets.

/s/ W. A. RILEY,  
President.

Subscribed and sworn to before me February 4, 1957, Shelby County, State of Tennessee.

[SEAL] By /s/ ETHEL H. RILEY,  
Notary Public in and for said  
County and State.

My Commission expires June 22, 1960.

Recorded at request of James C. R. McCall, Book 3796 Page 334, February 7, 1957. Official Records of Orange County, California.

/s/ RUBY McFARLAND,  
County Recorder.

Complaint amended:

7-22-57

10-18-57

[Endorsed]: Filed May 7, 1957. [15]

[Title of District Court and Cause.]

Civil Action No. 597-57Y

AMENDED AND SUPPLEMENTAL  
COMPLAINT

(For Money, to Enforce Mechanic's Lien and  
Declaratory Relief)

First Cause of Action

Comes plaintiff above named and, by leave of Court heretofore granted, amends and supplements its Complaint filed herein on May 7, 1957, by filing this Amended and Supplemental Complaint, and for cause of action against the defendants alleges:

I.

That jurisdiction of this action rests on Title 28 U.S. Code Sec. 1332, Subsection (a) (1).

II.

That at all times mentioned herein, plaintiff Dixie Tank & Bridge Co. was, and now is, a corporation duly organized and existing under and by virtue of the laws of the State of Tennessee, with its office and principal place of business at Memphis, Tennessee; and is a citizen of Tennessee. That at all times mentioned herein, [16] plaintiff was, and now is, a duly licensed contractor under the laws of the State of California.

III.

That at all times mentioned herein, the defendant County of Orange was, and now is, duly established

and organized as a County, under the laws of, and within, the State of California. That defendant Willis H. Warner, at all such times, was and is the Chairman of the Board of Supervisors of said County. That both of said defendants are citizens of the State of California.

#### IV.

That in the year 1956, plaintiff and the defendant County entered into three separate agreements in writing, wherein the plaintiff agreed to furnish the material and labor necessary therefor, and to clean, paint and repair the 100,000 gallon elevated water tank of the defendant County located at the Orange County General Hospital operated by the defendant County, and situated at or near the Town of Orange, within said County, upon the lands hereinafter described, and wherein the defendant County agreed to pay plaintiff therefor separately, sums totaling \$7,511.60, upon completion of said work. That said work was reasonably and necessarily divided into three or more contracts, work projects, or orders, because the necessary repairs to said tank, especially the amount of welding necessary to make the same water tight could not be determined until after the cleaning and scaling thereof. That the separate work projects or orders respectively involved therein, and the agreed price for each, were contracted for as follows:

(1). On August 28, 1956, the Board of Supervisors of said County in a regular meeting assembled, voted unanimously to authorize the Purchasing

Agent of said County to arrange for the repair of said tank at an estimated cost of \$6,500.00 as provided in Requisition No. M2946A. The Purchasing Agent duly solicited bids [17] from qualified contractors, including plaintiff, and duly reported plaintiff's bid as the lowest received in response to such invitation to bid.

(2). On October 2, 1956, the Board of Supervisors duly met and unanimously voted to authorize its Chairman aforesaid to sign for said County a contract with plaintiff obligating plaintiff to clean and paint said tank for a price of \$1,850.00, a copy of which contract is hereto attached, marked Exhibit A and incorporated herein in full by this reference; and pursuant thereto, said contract was duly signed by plaintiff and the defendant County, acting through its Chairman.

(3). On October 5, 1956, Erma Graham, Acting Purchasing Agent of said County, by authority of the Board of Supervisors, granted on August 28, 1956 as aforesaid, and pursuant to the invitation for bids aforesaid, issued to plaintiff the County's Order No. 62659, whereby the County further employed plaintiff to tighten and adjust all loose sway rods and to replace catwalk plates of said tank where necessary, for a price of \$1,000.00. That a copy of said Order No. 62659 is hereto attached, marked Exhibit B and incorporated herein in full by this reference. (The issuance of said work order was ratified by the Board of Supervisors on November 7, 1956, as next shown).



(4). Plaintiff duly cleaned the tank, which revealed that to render it water tight would require the welding of 3616 rusted out rivets and 712 lineal feet of seams, the price of which work, as set forth in plaintiff's bid aforesaid was 60c each for welding rivets and \$3.50 per lineal foot for welding the seams, making a total price for welding of both rivets and seams \$4,661.60. On November 7, 1956, with knowledge of all the foregoing, the Board of Supervisors again met and unanimously voted to authorize the Purchasing Agent to spend \$1,011.60 additional to the \$6,500.00 authorized on August 28, 1956, to complete said work and also to [18] authorize its Chairman to enter into a contract with plaintiff for said welding, a copy of which is hereto attached, marked Exhibit C and incorporated herein in full by this reference, and pursuant thereto plaintiff and the defendant County, acting through said Chairman, on November 7, 1956 signed said contract for said work. This Contract (Exhibit C), together with the contracts set forth in Exhibits A and B hereto, total \$7,511.60.

(5). On November 13, 1956, Courtney R. Chandler, Purchasing Agent of said County, issued to plaintiff a change order for \$1011.60 additional to the \$6500.00 originally authorized as aforesaid; and a copy of said change order is hereto attached marked Exhibit D and incorporated herein in full by this reference. That copies of the minutes of the Board of Supervisors relating to the letting of said contracts are consolidated into the paper which is

attached hereto marked Exhibit E and incorporated herein in full by this reference.

## V.

That plaintiff began the work called for by the first of said contracts on or about October 5, 1956, and completed the work required by each of them on November 21, 1956, on which date the work was accepted and approved by the said County's agent and representative in charge thereof. That the plaintiff fully kept and performed all the terms and conditions of said contracts on its part to be performed, and has offered, and now offers, to issue its standard form of warranty and guarantee (provided for in clause 4 of the contract dated October 2, 1956) covering the maintenance of said tank for a period of twelve years from date, upon condition that defendant County pay its just claim for said work in the sum of \$7,511.60. [19]

## VI.

That plaintiff made written demand on said County for payment of the \$7,511.60 aforesaid on November 24, 1956, and thereafter, for nearly six months, unsuccessfully negotiated with said Board of Supervisors and its representatives for payment of all, or any part, of the respective sums justly due to plaintiff under the contracts, Exhibits A, B, C, and D. That on or about May 18, 1957, plaintiff duly filed with and presented to the Board of Supervisors of said County four verified claims for its work under said contracts, setting forth as to each such contract true facts hereinabove alleged for sums due plaintiff thereon as follows:



Under the Contract	Amount Claimed
Claim No. 1—Ex. A. Dated: October 2, 1956.....	\$1,850.00
Claim No. 2—Ex. B. Dated: October 5, 1956.....	1,000.00
Claim No. 3—C & D. Dated: November 7 & 13, 1956.	4,661.60
	<hr/>
	\$7,511.60
Claim No. 4—Ex. A-C, incl. Dated: October 2-Novem- ber 7, 1956, and quantum meruit. ....	\$7,511.60

That the Board of Supervisors in a regular meeting assembled on May 28, 1957, voted unanimously to deny and reject each of said four claims. That a copy of the minutes of the action of said Board thereon is hereto attached marked Exhibit E-1 and incorporated herein in full by this reference.

#### VII.

That the land upon which said tank was so cleaned, repaired and painted under said agreements is described as follows, to wit:

A parcel of land situated in the County of Orange, State of California, known as the Orange County General Hospital Tract, formerly known as 12071 Santa Ana Boulevard, near the City of Orange, California, consisting of [20] about 10 acres, more or less, and occupied by the Orange County General Hospital, at the southwest corner of Placentia and West Chapman Streets.

That the whole thereof is required for the convenient use and occupation of said premises.

#### VIII.

That at all times mentioned herein the defendant County was the owner and reputed owner of said

land and of the buildings and water tank erected thereon.

### IX.

That on February 7, 1957, plaintiff filed for record in the office of the County Recorder of said County of Orange, its claim and notice of lien in writing, duly verified, a copy of which is attached hereto marked Exhibit F and made a part hereof; and which said claim and notice was thereafter on the same day duly recorded in said office in Book 3796, Page 334 of Official Records of Orange County, California, therein. That plaintiff paid \$2.50 for verifying and recording said lien.

### Second Cause of Action

For a second, separate and distinct cause of action against the defendants, plaintiff incorporates herein, by this reference, all of the allegations contained in all paragraphs of the First Cause of Action, *supra*, except paragraphs IV and V thereof, and in place and stead of said two paragraphs, alleges:

### I.

That on and between October 2, 1956, and November 21, 1956, at the special instance and request of defendant County of Orange, and upon its promise to pay the reasonable value thereof, made through its duly authorized representatives, to wit, the Board of Supervisors, the Chairman of said Board, and the Purchasing Agent of said County, plaintiff furnished and performed work and labor

and materials necessary for the cleaning, painting and repair of [21] the 100,000 gallon elevated water tank of the defendant County, situated on the premises known as the Orange County General Hospital Tract, which labor and material were furnished and consumed in said work; and that said labor and materials were of the reasonable worth and value of \$7,511.60, no part of which has been paid. That plaintiff completed said work, and the same was duly accepted by the County on November 21, 1956; and that on or about May 18, 1957, plaintiff duly filed with and presented to the Board of Supervisors of said County a verified claim for its work and materials so furnished in said sum of \$7,511.60; and that the said Board in a regular meeting assembled on May 28, 1957, unanimously voted to deny and reject said claim.

### Third Cause of Action

For a third, separate and distinct cause of action against the defendants plaintiff incorporates herein by this reference all of the allegations contained in all of the paragraphs of the First Cause of Action, *supra*, and in addition alleges the following facts:

#### I.

That in, and as a part of, the aforesaid written contracts between plaintiff and the defendant County dated October 2, 1956, and November 7, 1956 (Exhibits A and C hereto), the defendant Willis H. Warner covenanted with plaintiff that he, the said Willis H. Warner, was fully authorized and empowered to sign, execute and deliver such

contracts on behalf of said County, and that all legal requirements therefor had been fully complied with. That plaintiff confided in and relied upon said personal covenant of said Chairman of the Board of Supervisors in entering into and performing the work and furnishing the materials aforesaid, and that plaintiff was induced and led to perform said work and furnish said materials by means thereof. [22]

## II.

That plaintiff is informed and believes, and on such belief alleges that notwithstanding the due execution and performance of the said contracts on the part of plaintiff, the defendant County refuses to pay anything whatever for plaintiff's work and materials furnished in good faith thereunder on the alleged ground that each and all of said contracts are void and unenforceable because, as defendants contend, although there was actual competitive bidding on invitations for bids for said work, the Chairman of the Board allegedly did not advertise for bids in a local newspaper as allegedly required by Sections 25450 and 25452 of the Government Code of California. That plaintiff is informed and believes, and on the basis thereof alleges that the various work projects involved in said contracts were not required to be so advertised, and that the contracts were each validly entered into and are each enforceable against the County; but that if, and to the extent that any of them may be void and unenforceable against the County because of such alleged defect in failing to advertise for

bids, the defendant Willis H. Warner is personally liable to plaintiff on his covenants aforesaid for the oversight and for plaintiff's resulting loss in performing the said contracts.

Wherefore, plaintiff demands judgment as follows:

1. Against the defendant County of Orange and the defendant Willis H. Warner, in the sum of \$7,511.60, together with interest thereon at the rate of seven per cent per annum from November 24, 1956, and for plaintiff's costs, and the sum of \$2.50 for filing and recording the lien notice aforesaid; and that the premises hereinabove described be sold and the proceeds thereof applied to the payment of said judgment, interest and costs.

2. That the Court decree and declare whether, and to what extent, if any, the contracts for the work aforesaid are [23] invalid under Sections 25450 and 25452 of the Government Code of the State of California; and

3. For all such other, further and different relief as the Court deems just in the premises.

/s/ JAMES C. R. McCALL,  
Attorney for Plaintiff.

[Exhibits A-F attached to the foregoing are identical to Exhibits A-F attached to the Original Complaint.] [24]



## EXHIBIT E-1

Minutes of the Board of Supervisors  
of Orange County, California

May 28, 1957.

A regular meeting of the Board of Supervisors of Orange County, California, was held May 28, 1957, at 9:30 a.m. The following named members being present: Willis H. Warner, Chairman; C. M. Featherly, William J. Phillips, Wm. H. Hirstein, Heinz Kaiser and the Clerk.

In Re: Claims — Dixie Tank and Bridge Company — High Water Tank at Orange County Hospital — Denied.

On motion of Supervisor Kaiser, duly seconded and unanimously carried, the four claims designated as Claim No. 1 in the sum of \$1850.00, Claim No. 2 in the sum of \$1000.00, Claim No. 3 in the sum of \$4661.60 and Claim No. 4 in the sum of \$7511.60 of the Dixie Tank and Bridge Company, dated May 14, 1957, pertaining to rigging, cleaning, descaling, painting, repairing, etc., the 100,000 gallon elevated water tank located at the Orange County General Hospital at Orange, California, received by the County Clerk on May 20, 1957, were denied and ordered referred to the County Counsel for study and recommendation.

State of California,  
County of Orange—ss.

[Title of District Court and Cause.]

I, L. B. Wallace, County Clerk and ex-officio Clerk of the Board of Supervisors of Orange County, California, hereby certify the foregoing to be a full, true and correct copy of the minute entry on record in this office.

In Witness Whereof, I have hereunto set my hand and seal this 28th day of May, 1957.

/s/ L. B. WALLACE,

County Clerk and ex-officio Clerk of the Board of Supervisors of Orange County, California.

[Endorsed]: Filed July 22, 1957.

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ANSWER TO AMENDED AND SUPPLEMENTAL COMPLAINT AND DEFENSES

Defendants admit, deny, and allege as follows:

First Defense

1. Admit Paragraphs I, II, and III.
2. Admit the allegations of Paragraph IV in so far as said Paragraph alleges Plaintiff and Defendant County, and Defendant Warner, acting as agent for Defendant County, entered into two written agreements, one dated September 21, 1956, and one dated November 7, 1956, for the purpose de-



scribed in the first sentence of Paragraph IV, lines 11 through 20, Page 2, of the Amended Complaint; deny that said work was reasonably and necessarily divided into three or more contracts, work projects or orders; deny that separate contracts, work projects, or orders were involved; admit that on August 28, 1956, the Board of Supervisors of Defendant County authorized the Purchasing Agent of Defendant [32] County to arrange for the repair of the tank referred to in the Amended Complaint at an estimated cost of \$6,500.00 as provided in Requisition No. M2946A; deny that the Purchasing Agent duly solicited bids from qualified contractors; allege Purchasing Agent wrote letters to some contractors and received two answers, one from the Plaintiff; deny any of the provisions of Article 5, Chapter 5, Part 2, Division 2 of Title 3, Government Code of the State of California (Sections 25450 and following) were complied with; specifically deny any advertisement for bids took place regarding any work or material regarding the tank; admit Paragraph IV (2), (3), (4) and (5), line 4 on Page 3 through line 16 on Page 4 of the Amended Complaint.

3. Admit the allegations of Paragraph V, except the claim referred to in line 28 of Page 4 of the Complaint is not a "just claim," but is "a claim."

4. Admit the allegations of Paragraph VI, except the facts referred to in line 10, Page 5, are not "true facts," but are "alleged facts."

5. Admit the allegations of Paragraph VII, VIII and IX.

Answering the Purported "Second Cause of Action":

1. Defendants incorporate hereby the admissions, denials, and allegations set forth in response to the purported "First Cause of Action."

2. Admit the allegations of Paragraph I of the purported "Second Cause of Action."

Answering the Purported "Third Cause of Action":

1. Defendants incorporate hereby the admissions, denials, and allegations set forth in response to the purported "First Cause of Action."

2. Admit the allegations of Paragraph I of the purported "Third Cause of Action," except that Plaintiff relied upon or confided in any [33] particular representation of Defendant Warner; deny that Plaintiff relied upon or confided in any particular representation of Defendant Warner; deny that said covenant was a personal covenant; deny there was any induction or leading of the Plaintiff by anyone; allege that one C. A. Lindsey, purporting to act as an authorized agent for the Plaintiff, also signed the contract referred to as Exhibit "C", and thereby also represented that all legal requirements have been fully complied with.

3. Admit the allegations of the first sentence of Paragraph II of the purported "Third Cause of

Action," lines 2 through 12, Page 8 of the Amended Complaint, except the recitation, which the Defendants deny, that "there was actual competitive bidding on invitation for bids for said work," lines 8 and 9 on said page; deny the second sentence of said paragraph, lines 12 through 20 on said page.

### Second Defense

The Complaint fails to state a claim against Defendants, or either of them, upon which relief can be granted.

Wherefore, Defendants pray for:

1. Dismissal of this action with costs assessed against Plaintiff in favor of Defendants;
2. Such other relief as the Court may deem just.

Dated: July 29, 1957.

JOEL E. OGLE,  
County Counsel;

STEPHEN K. TAMURA,  
Assistant;

ADRIAN KUYPER,  
Deputy.

By /s/ ADRIAN KUYPER,  
Deputy, Attorneys for  
Defendants.

Certificate of service by mail attached.

[Endorsed]: Filed July 30, 1957. [34]

[Title of District Court and Cause.]

MOTION AND NOTICE OF MOTION FOR  
JUDGMENT ON THE PLEADINGS AND  
FOR DISMISSAL TOGETHER WITH  
STATEMENT OF THE CASE AND  
POINTS AND AUTHORITIES

Defendants County of Orange and Willis H. Warner move the Court to enter Judgment on the Pleadings in favor of said Defendants and to dismiss this cause at the Plaintiff's costs for the reason that the Plaintiff in his Complaint, as amended, has failed to state a claim against the Defendants, or either of them, upon which relief can be granted.

Notice Is Hereby Given to Dixie Tank & Bridge Co. and to James C. R. McCall, its attorney,

That Defendants County of Orange and Willis H. Warner will, on September 9, 1957, in the above-entitled Court, at 10:00 o'clock a.m. make this motion.

Dated: July 29, 1957.

JOEL E. OGLE,  
County Counsel;

STEPHEN K. TAMURA,  
Assistant;

ADRIAN KUYPER,  
Deputy.

By /s/ ADRIAN KUYPER,  
Deputy, Attorneys for  
Defendants. [36]

Statement of the Case and  
Points and Authorities

The events upon which the Complaint is attempted to be founded arose out of work done by the Plaintiff on a high-water tank located on the grounds of the Orange County General Hospital in the fall of 1956. As shown by the copy of the Minute Order of the Board of Supervisors of the County of Orange, dated August 28, 1956 (part of Exhibit "E" to the Complaint), the original estimate of the job was \$6,500.00. There is no indication that this estimate was ever less than this amount. The estimated cost was increased on or about November 7, 1956, by the amount of \$1,011.60 making a total bill of \$7,511.60, which is the amount finally billed and the amount prayed for in the Complaint.

The Government Code of the State of California by its Section 25450 provides, "whenever the estimated cost of any construction of any \* \* \* public building or the cost of any repairs thereto exceeds the sum of \$4,000.00 \* \* \* the work shall be done by contract. Any such contract not let pursuant to this article is void." (Emphasis added.)

The article referred to requires advertising for bids and adoption of plans and specifications (Sections 25452 and 25451); neither advertising for bids nor adoption of plans or specifications occurred in connection with this job; none is alleged in the Complaint; such action is specifically denied by the Answer.



The California cases construing this act are quite clear that not only is the contract void, but no recovery in quantum meruit is allowed.

Miller vs. McKinnon, 20 Cal. 2d 83, 124 P. 2d 34, was a taxpayer's action to recover over \$42,000.00 expended by Santa Clara County on repairing a rock quarry. The trial court dismissed the action after sustaining a demurrer to the complaint on the ground that no action was stated. The Supreme Court reversed with directions to overrule the demurrer. The Court stated such contracts as are let without [37] competitive bidding cannot be ratified, that no estoppel to deny their validity can be invoked against the County for entering into contracts without such bidding, that no recovery in quasi contract can be had pursuant to such contracts. The Court also pointed out that persons dealing with any public agency are presumed to know the law with respect to the requirement of competitive bidding and act at their peril. Extensive citations of authority to support these general propositions are found on page 88 of 20 Cal. 2d and page 37 of 124 P. 2d. The Court, in addition, stated that the job cannot be split into separate parts as a device for thwarting the public policy declared in the Government Code.

County of San Diego v. California Water and Telephone Company, 30 Cal. 2d 817, 186 P. 2d 124, was an action by a County against a utility company to enjoin the completion of a dam on which the company had already spent \$800,000.00, because



the work was causing a flooding of a county highway. The utility company alleged the county had abandoned the highway in question and had accepted an easement from the company for another location. The easement contained an agreement that the company would not be liable for flooding damage to the highway. The Court held the agreement was *ultra vires* and void. There was no estoppel. The Court stated that neither the doctrine of estoppel nor any other equitable principle may be invoked against a governmental body where it would operate to defeat the effective operation to protect the public.

Nor can Mr. Warner, the Chairman of the Board of Supervisors acting as agent for the County, in signing the various contracts alleged in the Complaint, be held liable:

“When an officer or public agent contracts in good faith with parties having knowledge of the extent of his authority or who have equal means of knowledge, especially where the authority of the officer is [38] prescribed by law, he will not become individually responsible unless the intent to incur liability is clearly expressed, although it should be found that, through ignorance of the law, he may have exceeded his authority.” (McQuillin 4 Municipal Corporations 163, Section 12.214.) (Emphasis added.) [39]

Certificate of service by mail attached.

[Endorsed]: Filed July 30, 1957.

[Title of District Court and Cause.]

AFFIDAVIT IN SUPPORT OF MOTION FOR  
JUDGMENT ON THE PLEADINGS AND  
FOR DISMISSAL

State of California,  
County of Orange—ss.

Affiant deposes and says:

That Affiant's name is Erma Graham and that Affiant is Assistant Purchasing Agent for the County of Orange and held such position at all times mentioned herein; that Affiant received a copy of a Minute Order of the Board of Supervisors of the County of Orange dated August 28, 1956, which authorized the Purchasing Agent to "arrange for the repair of the high tank at the Orange County Hospital"; that Affiant caused to be made forms for the receipt of bids from contractors for this repair and sent the same to four or five contractors including the Dixie Tank & Bridge Company; that Affiant received two replies on these forms, one of which was withdrawn prior to the date set for final acceptance of the bids; that the one remaining bid was that submitted [41] by the Dixie Tank & Bridge Company; that there was no advertising for bids for the performance of the work, as required by Section 25452 of the Government Code; that there were no plans, specifications, strain sheets, and working details for the work adopted by the Board of Supervisors, as required by Section 25451 of the Government Code.

Dated: June 14th, 1957.

/s/ ERMA GRAHAM.

Subscribed and Sworn to Before Me this 14th day of June, 1957.

[Seal] /s/ ELIZABETH M. HEEMSTRA,  
Notary Public in and for Said  
County and State.

My Commission Expires Dec. 30, 1958.

Certificate of service by mail attached.

[Endorsed]: Filed July 30, 1957. [42]

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[Title of District Court and Cause.]

## MINUTES OF THE COURT

September 18, 1957

Present: Hon. Leon R. Yankwich, District Judge;

Deputy Clerk: L. Cunliffe; Reporter  
Marie Zellner.

Counsel for Plaintiff: James C. R. Mc-  
Call, Esq.

Counsel for Defendant: Adrian Kuyper  
and Stephen Tamura.

### Proceedings:

Re-hearing on motion of defendants County of Orange and Willis H. Warner for judgment on the pleadings and for dismissal:

Court makes statement.

Attorney McCall makes statement and moves that order of submission made September 16, 1957, be set aside and that plaintiff be allowed to present further memorandum of points and authorities in support of plaintiff's opposition to the motion for judgment, etc.

Attorney Kuyper, for defendants—offers no opposition to plaintiff attorney's motion to offer further brief but does oppose plaintiff's motion to set aside order of submission.

Court orders plaintiff's motion to set aside order of submission denied.

Attorney McCall makes further statement, and

It Is Ordered that defendants' motion for judgment on the pleadings and for dismissal be granted with leave to plaintiff to file amended complaint within 30 days, or up to and including October 19, 1957, and that such amended complaint set forth all the facts that occurred and shall include in addition to the exhibits already submitted any other resolutions of the Board of Supervisors of Orange County indicating their intentions in the matter and further that such amended complaint is to set forth separately cause of action against individual defendant, Willis H. Warner, in the allegations.

JOHN A. CHILDRESS,

Clerk;

By /s/ L. CUNLIFFE,

Deputy Clerk. [44]

[Title of District Court and Cause.]

SECOND AMENDED AND SUPPLEMENTAL  
COMPLAINT

(For Money)

First Cause of Action

Comes plaintiff, Dixie Tank & Bridge Co., and by leave of Court heretofore granted, files this Second Amended and Supplemental Complaint in lieu of the complaint filed herein on May 7, 1957, and the Amended and Supplemental Complaint filed herein on July 22, 1957, and for cause of action against the defendant, County of Orange, alleges:

I.

Jurisdiction of this action rests on Title 28 U. S. Code Sec. 1332, Subsection (a) (1).

II.

At all times mentioned herein, plaintiff Dixie Tank & Bridge Co. was, and now is, a corporation duly organized and [45] existing under and by virtue of the laws of the State of Tennessee, with its office and principal place of business at Memphis, Tennessee; and is a citizen of Tennessee. At all times mentioned herein, plaintiff was, and now is, a duly licensed contractor under the laws of the State of California.

III.

At all times mentioned herein, the defendant County of Orange was, and now is, a duly estab-



lished and organized county within, and under the laws of, the State of California. Defendant, Willis H. Warner, at all such times, was and is a resident of such county and the chairman of the Board of Supervisors thereof. Both of said defendants are citizens of the State of California.

#### IV.

At all times mentioned herein, the defendant County owned and operated the Orange County General Hospital located near Orange, California, and owned and used in connection therewith a 100,000 gallon elevated steel water tank standing on the hospital property; and at all such times R. D. Powell was the director of said hospital and the County's employee in charge of its operation; and W. E. H. Rasmussen was the superintendent of buildings and grounds at said hospital, and the County's representative in charge of the plaintiff's work hereinbelow mentioned. Between October 2, 1956, and November 7, 1956, through and pursuant to actual and bona fide competitive bidding therefore, the Board of Supervisors of Orange County awarded and let to plaintiff, in a series of written contracts, for separate prices, the performance of eight certain and separate work orders or projects, all relating to the cleaning, repair and painting of said tank. The combined total contract price of said eight separate work projects was \$7,511.60. Between October 2, 1956, and November 21, 1956, plaintiff duly performed [46] said eight work



projects and everything required of plaintiff under said written contracts, to the satisfaction of the defendant County, which, on the latter date, accepted plaintiff's performance thereof as satisfactory by and through W. E. H. Rasmussen, it's representative in charge of said work. No part of the agreed contract price for any of said work has been paid; and though justly indebted to plaintiff therefor ever since November 21, 1956, the defendant County has continuously to date failed and refused to pay plaintiff therefor, despite its due demands therefor.

## V.

The eight work orders or projects so performed by plaintiff and the agreed contract price for each are shown in the following table which contains also a separate project number by which said respective work orders or projects are hereinafter sometimes referred to in this complaint:

Project No.	Description of Project	Contract Price
1	Rig, scale and clean inside of tank with scaling machine to clean metal. ....	\$ 550.00
2	Weld all rusted out rivets (3,616 at 60 cents each)	2,169.60
3	Weld all deteriorated seams (712 feet at \$3.50 per foot). ....	2,492.00
4	Weld all pits in tank plates that are over halfway through tank plates (none at 60 cents each).....	
5	Tighten and adjust all loose sway rods. ....	150.00
6	Prime and reline interior of tank. ....	650.00
7	Remove loose rust and paint from exterior of tank and tower, and spot prime and repaint exterior of tower and tank. ....	650.00
8	Replace catwalk plates where necessary. ....	850.00

The total tank work was divided or separated into the above [47] eight projects by the County, acting through the above-named hospital officials and the Board of Supervisors, before bids were requested of contractors for the performance thereof, and plaintiff and other bidders were instructed to and did bid a price for each project, the amounts of plaintiff's bids therefor being the contract prices shown above.

## VI.

After completion and acceptance of said eight work projects on November 21, 1956, plaintiff on November 24, 1956, made written demand on defendant County for payment of the agreed prices therefor totaling \$7,511.60, and thereafter, for nearly six months, unsuccessfully negotiated with the Board of Supervisors of said County and its representatives for payment of all or any part, of the respective sums shown in the above table. That on or about May 18, 1957, plaintiff filed with and presented to the Board of Supervisors four verified claims for its work on said eight projects under said contracts, setting forth as to each contract the particular work order or project, above listed, and each project covered thereby. The Board of Supervisors in a regular meeting thereof on May 28, 1957, voted unanimously to deny and reject each and all of plaintiff's said four claims, in full. The four claims were:

	Amount Claimed
For Work Under Contract	
Claim No. 1—Dated: Oct. 2, 1956.	
Project No.: 1, 6 & 7.....	\$1,850.00
Claim No. 2—Dated: Oct. 5, 1956.	
Project No.: 5 & 8. ....	1,000.00
Claim No. 3—Dated: Nov. 7, 1956.	
Project No.: 2 & 3. ....	4,661.60
Claim No. 4—All contracts and quantum meruit—all but 4. ....	\$7,511.60
Total. ....	<hr/> \$7,511.60

## VII.

Plaintiff is informed and believes, and on such information [48] and belief alleges, that the Board of Supervisors rejected, and now refuses to pay plaintiff's claims for the above work upon the alleged grounds that said Board of Supervisors neglected, in letting said contracts to plaintiff, to perform its alleged statutory duty under government code Sections 25452 and 25451 by failing to advertise for bids for such work in a daily newspaper published in Orange County and by failing to "adopt plans, specifications, strain sheets, and working details for the work," before contracting with plaintiff for said work; and plaintiff is informed, believes and states that inasmuch as the control of the defense of this action is vested in said Board of Supervisors under the provisions of government code Section 25203, the defendant County will inject said claims of malfeasance by said Board of Supervisors in defense of this action upon the theory that the Board's alleged shortcomings in those respects rendered the contracts

with plaintiff void and unenforceable against the County under the provisions of Government Code Section 25450.

### VIII.

Plaintiff is informed, believes and represents that said proposed defenses are legally insufficient to constitute a defense on the facts of this case, even if true, and further that the defendant County is, and ought to be held, estopped to plead or prove such facts, by the following facts, to wit:

1. The total tank repair work was naturally and necessarily divided or separated by the County and the Board of Supervisors into the eight work orders or projects aforesaid, and competitive bids therefor were solicited, for the purpose of enabling the County to perform by day's work and more economically such parts of the eight projects for which the bids received were too high in the opinion of the proper county officials, and for the purpose of securing fair and [49] economical unit bids for the welding work involved in projects Nos. 2, 3 and 4 above, the needed extent of which could not be ascertained or determined before the tank had been rigged, cleaned and descaled. The tank work was not split into such smaller work orders or projects for the purpose of evading the statute requiring public work to be done by contract after competitive bidding, within the prohibition of Government Code Section 25450.5, but was split by the County and Board of Supervisors in good faith and for the bona fide purposes hereinabove stated, and Govern-



ment Code Section 25450 was and is inapplicable to the letting of said work projects to plaintiff.

2. On October 2, 1956 and November 7, 1956, in regular meeting assembled, the Board of Supervisors had before it for consideration the written contracts proposed to be entered into with plaintiff for the performance of the work, and unanimously voted to authorize and direct the chairman of said Board to execute said specific contracts with plaintiff. Each of said contracts at that time contained, and after execution, now contains, a covenant that the person signing the contract on behalf of the County "was fully authorized and empowered to sign, execute and deliver the same and that all legal requirements have been fully complied with." By authorizing and directing the chairman to sign said contracts containing such covenant, the Board of Supervisors and the County estopped themselves from now contending and offering to prove that the alleged legal requirements for advertising in a newspaper for bids and adoption of working details, had not been complied with.

3. Plaintiff, at the time of the execution of said contracts and its performance of the work called for thereby, reasonably believe that the Board of Supervisors had performed and complied with all legal requirements in letting said contracts [50] to plaintiff, and in good faith relied upon said representation by the Board of Supervisors in accepting and performing said contracts and; will be inequitably, certainly and irritrievably damaged if

the Board of Supervisors and the County are permitted to rely upon and prove such alleged breaches by the Board of its legal duties.

## IX.

The labor and materials furnished by plaintiff and consumed in the performance of said work were of the reasonable worth and value of \$7,511.60, and the reasonable worth and value of the labor and material furnished and consumed in the performance of each of said eight work orders or projects by plaintiff is equal to the above-stated contract price therefor; and the defendant County has accepted and is using and intends to keep the product of plaintiff's said work and material without paying plaintiff anything therefor.

## X.

Attached hereto and incorporated herein in full by this reference are copies of the documents reflecting the letting and performance of the contracts between the plaintiff and defendant County, said copies being marked Exhibits hereto as follows:

## Table of Exhibits

Ex. No. & Document	Date
A: Requisition No. M2946A. ....	8-23-56
B: Request for Bid and Plaintiff's Bid.....	9- 4-56
C: Request for Bid and E. R. Waites' Bid.....	9-18-56
D: Contract for Projects Nos. 1, 6 & 7 (\$1,850.).	10- 2-56
E: Purchase Order No. 62659. ....	10- 5-56
F: Contract (Final). ....	11- 7-56
G: Change Order. ....	11-13-56
	[51]
H: Acceptance of work by County. ....	11-21-56
I: Plaintiff's Bill for work. ....	11-24-56



## XI.

The work was let and performed as follows:

1. On August 23, 1956, the director of the Orange County General Hospital filed with the purchasing agent of said County requisition No. M2946A (Exhibit "A") for repair of the tank divided into the eight work orders or projects aforesaid. This requisition was transmitted by the hospital committee of the Board of Supervisors to said Board with the recommendation that the purchasing agent of the County be authorized to arrange for making these repairs as so divided. On August 28, 1956, the Board of Supervisors at a regular meeting unanimously adopted and passed a motion recited in its minutes as follows:

"In Re: Repair High Tank—Orange County Hospital:

"On motion of Supervisor Kaiser, duly seconded and unanimously carried, the Purchasing Agent was authorized to arrange for the repair of the high tank at the Orange County Hospital as requested by R. D. Powell, Orange County Hospital Director. Estimated cost per Requisition No. M2946A is \$6,500.00."

2. Pursuant to this authority the purchasing agent on August 31, 1956, under the Docket "Bid No. 6933" mailed a Request for Bid to five contractors, in the form shown by Exhibits "B" and "C" hereto. The request listed the eight work projects above mentioned and requested unit prices, ex-

tension and the total as to each, with the right reserved to the County to reject any and all bids; and required all bids to be returned by September 18, 1956. The request was sent by the purchasing agent to the following prospective bidders:

Pacific Brick & Tank Coating Co., 1051 E. Wardlow Road, [52] Long Beach, California;

Pittsburgh-Des Moines Steel Co., P.O. Box 2012, El Monte, California;

Dixie Tank & Bridge Co., P.O. Box 1, Memphis 1, Tennessee;

Pittsburg Tank & Tower Co., c/o M. C. Mattis, 861 So. Palm, Anaheim, California;

West Coat Corrosion Engineering Corp., c/o D. N. Sullivan, P.O. Box 1164, Santa Ana, California.

3. In response to this solicitation by the purchasing agent, two bids were submitted, each listing prices for each of the eight work projects. A copy of the bid submitted by Dixie Tank & Bridge Co., plaintiff, is Exhibit "B" hereto. The bid submitted by E. R. Waites resulting from solicitation of Pittsburgh Tank & Tower Co., is Exhibit "C" hereto. The Waites' bid was withdrawn on September 18, 1956.

4. On September 19, 1956, the purchasing agent by letter inquired of plaintiff concerning its inspection service and guarantee of its work for a period of years after performing tank repair work.

Plaintiff signed and forwarded its standard form of contract for cleaning, scaling and painting, a copy of which is Exhibit "D" hereto, on September 21, 1956. On October 2, 1956, this standard form contract was considered by the Board of Supervisors of Orange County at a regular meeting and by unanimous vote the Board took action with respect thereto, as shown by its minutes, as follows:

"In Re: Contract—Cleaning, Scaling, Repairing, Etc., Water Tank—Orange County Hospital:

"On motion of Supervisor Kaiser, duly seconded and unanimously carried by Board members present, the contract dated October 2, 1956, with the Dixie Tank & Bridge Co., for the cleaning, scaling, repairing, etc., the 100,000 gallon water tank at the Orange County Hospital was approved and the Chairman was authorized to sign such contract."

On the same day the chairman of the Board, pursuant to this authority, signed said contract, a copy of which is Exhibit "D" hereto. This contract provided that for \$1,850.00 plaintiff [53] would rig, clean and scale the inside of the tank for inspection by the County and that after the tank had been so inspected plaintiff would submit a flat sum bid for repairs to the tank and that a written repair contract for specific repair work to be done and the entire price to be paid would thereafter be entered into by plaintiff and the County before any repair work would be done. It also contained, in Paragraph 10 thereof as follows:

“Parties signing this contract in behalf of first party (the County) covenant and agree that they are fully authorized and empowered to sign, seal, deliver and execute the same and that all legal requirements have been fully complied with.” (Parenthetic insertion ours.)

5. On October 5, 1956, the County purchasing agent notified plaintiff of the execution of the above contract and sent plaintiff the County's purchase order No. 62659, a copy of which is Exhibit “E” hereto. This purchase order included the items covered by the above contract (Projects Nos. 1, 6 and 7) and in addition Projects Nos. 5 and 8 at an additional \$1,000.00, making the total price agreed upon at a flat sum of \$2,850.00, and leaving the amount of welding covered by Projects Nos. 2, 3 and 4 to be determined and ascertained in a later contract as provided in the contract Exhibit “D” hereto.

6. Plaintiff rigged, cleaned and descaled the tank and the County's inspection then revealed that there were 3,616 rusted out rivets and 712 lineal feet of seams which needed welding. On November 7, 1956, at a regular meeting of the Board of Supervisors the matter of such welding was brought before the Board and a final contract covering the additional work was submitted. At said meeting the Board, by vote, unanimously authorized and directed its chairman to sign said contract, and in addition authorized the purchasing agent to expend an [54] additional \$1,011.60 on the tank work. The action

taken by the Board at that time, as reflected by its Minutes was as follows:

“In Re: Additional Amount—Labor and Material,  
High Water Tank—County Hospital:

“On motion of Supervisor Hirstein, duly seconded and unanimously carried, the Purchasing Agent was authorized an additional amount of \$1,011.60, covering labor and material necessary to repair high water tank, 100,000 gallons, at the County Hospital.

“Original minute order dated October 2, 1956.”

“In Re: Contract for Emergency Repairs—Repair  
High Water Tank, Orange County Hospital,  
Dixie Tank and Bridge Company:

“On motion of Supervisor Kaiser, duly seconded and unanimously carried, the Chairman was authorized to sign the contract with Dixie Tank and Bridge Company for the repair of the High Water Tank at the Orange County Hospital, in the amount of \$7,511.60.”

Pursuant to this authority the Chairman on November 7, 1956, signed with Dixie Tank and Bridge Company the contract covering the items of welding (Projects Nos. 2 and 3), along with the work already contracted for and substantially completed, a copy of which final contract is Exhibit “F” hereto. This contract fixed the price for all the work done or to be done by plaintiff at \$7,511.60 and in Paragraph 12 thereof provided:



“The party or parties signing this contract on behalf of the first party (the County) covenant and agree that they are fully authorized to sign, execute and deliver the same and that all legal requirements have been fully complied with.”

7. On November 13, 1956, plaintiff was informed of the Board's execution of the contract of November 7, 1956, and the purchasing agent issued to plaintiff a change order for additional labor and material in the sum of \$1,011.60, a copy of which is attached as Exhibit “G” hereto. Plaintiff [55] thereupon completed the work on November 21, 1956, and on that date the same was inspected and accepted by the County as reflected by the letter of W. E. H. Rasmussen, Superintendent of Buildings and Grounds, a copy of which is Exhibit “H” hereto. On November 24, 1956, plaintiff billed the County for the eight projects in the total sum of \$7,511.60, a copy of which bill is hereto attached marked Exhibit “I.”

## XII.

By reason of the foregoing, the defendant County is justly indebted to plaintiff in the sum of \$7,511.60, together with interest thereon at the rate of seven per cent per annum from November 24, 1956, to date of judgment.

## Second Cause of Action

For a second, separate and distinct cause of action against the defendant, Willis H. Warner, plaintiff Dixie Tank and Bridge Co. incorporates by



this reference all of the allegations contained in all of the paragraphs of the first cause of action, *supra*, and in addition alleges:

### I.

On October 2, 1956, in executing that certain contract for cleaning, scaling, inspecting and painting the elevated water tank hereinabove mentioned, between plaintiff and defendant Orange County, a copy of which is hereto attached and marked Exhibit "D" and incorporated herein by this reference, the defendant, Willis H. Warner, in Paragraph 10 thereof, contracted and covenanted with plaintiff as follows:

"Parties signing this contract on behalf of first party covenant and agree that they are fully authorized and empowered to sign, seal, deliver and execute the same and that all legal requirements have been fully complied with." [56]

### II.

On November 7, 1956, in signing the final contract between said County and plaintiff, a copy of which is hereto attached marked Exhibit "F" and incorporated herein by this reference, the defendant Willis H. Warner covenanted with plaintiff in Paragraph 12 thereof as follows:

"The party or parties signing this contract on behalf of first party covenant and agree that they are fully authorized and empowered to sign, execute and deliver the same, and that all legal requirements have been fully complied with."

III.

In said quoted clauses the words "the party or parties signing this contract" refer and mean the defendant Willis M. Warner; and the words "the first party" refer to and mean the County of Orange; and the words "that all legal requirements have been fully complied with" refer to and mean that all legal requirement for making the contract by the County had been fully complied with.

IV.

Plaintiff is informed, believes and states that the County of Orange contends and will defend this action upon the alleged grounds that legal requirements for the making of said contracts had not been complied with in that there had been no newspaper advertising for bids as allegedly required by Government Code, Section 25452, and that the Board of Supervisors had not adopted plans, specifications, strain sheets and working details for the work as allegedly required by Government Code, Section 25451; and hence, the two contracts were void and unenforceable under the provision of Government Code, Section 25450. [57]

V.

If the defendant County is permitted to contest this action on said grounds and plaintiff, on said grounds, shall be denied recovery against the County under the first cause of action, then and in that event plaintiff will have been subjected to damages in the sum of \$7,511.60 by reason of and as

the proximate result of the breach of said covenants that all legal requirements had been fully complied with.

## VI.

That plaintiff relied upon said covenants of the defendant Willis H. Warner in entering into and performing said contracts.

Wherefore, plaintiff demands judgment as follows:

1. Against the defendant County of Orange in the sum of \$7,511.60, together with interest thereon at the rate of seven per cent per annum from November 24, 1956; and

2. In the alternative, for judgment against the defendant Willis H. Warner in the sum of \$7,511.60 as damages for breach of covenant under the Second Cause of Action.

3. For all such further, other and different relief as the Court deems just in the premises.

/s/ JAMES C. R. McCALL,  
Attorney for Plaintiff. [58]

*Wm G. Davis*

COUNTY OF ORANGE  
**REQUISITION**

No. **100000**

Date **8-28-24**

TO THE PURCHASING AGENT:

The following materials or supplies are required by

**HOSPITAL**

(Full Name and Department)

Please arrange for their purchase and delivery

Deliveries to be made to (address)

**MAINTENANCE**

on or before

Quantity	DESCRIPTION	AMOUNT		PURCHASING AGENT'S DATA	
		Dollars	Cents	FROM WHOM ORDERED	ORDER NO.
	Repair of 100,000 Gal. High tank at Orange County General Hospital.			<i>Rein. Tank &amp; Bridge</i>	<i>67459</i>
	Sub-Total	505	00		
	Rig, scale and clean inside of tank with scaling machine to clean metal.				
	Weld all rusted out rivets. Weld all deteriorated seams. Weld all pits in tank plates that are over halfway thru tank plates.				
	Tighten and adjust all loose arm rods.			<i>Repair &amp; Replacement</i>	
	Prime and relime interior of tank.			<i>Operation &amp; Maintenance</i>	
	Remove loose rust and paint from exterior of tank and tower and spot prime and re-paint exterior of tower and tank.			<i>See 2 - Budget to item 10</i>	
	Replace catwalk plates where necessary.				
	Sub-total	5,915	00		
	(Budget Item 48)				
	Grand Total	64,500	00		
	<i>Bond &amp; Co. Inc. etc.</i>				
	<i>Wm G. Davis</i>				

Materials or supplies to be used or required for

*Wm G. Davis*

Requisition issued by

(Head of Department or Chief Deputy)

MA-20-240

1007 1:10

EXHIBIT "A"



## EXHIBIT B

Request for Bid  
(Not an Order)

Bid No. 6933

Santa Ana, Calif., August 31, 1956

Please quote your lowest prices On This Sheet for the following material, f.o.b. County of Orange Hospital, 12071 Santa Ana Blvd., Orange, California.

No charge will be allowed for package or drayage unless so specified on this bid.

Unit prices, extension and total must be made by bidder.

The right is reserved to reject any or all bids. This sheet must be signed below by bidder.

When bidding on goods other than specified, bidder must state brand quoted on and give catalogue reference.

Bid number must show on outside of bid envelope.

Samples submitted must be tagged with dealer's name.

Bids must be signed by bidder or his agent.

Quotations will be received until September 18, 1956, 10:00 a.m.

Bids will not be accepted unless this sheet is returned with prices thereon.

Labor and material necessary to repair 100,00-gallon high tank as follows:

## Articles Required

	Unit Price	Total
Rig, scale and clean inside of tank with scaling machines to clean metal. ....		\$550.00
Weld all rusted out rivets. (Unit: each.).....	\$0.60	Amount unknown
Weld all deteriorated seams. (Unit: per lineal foot.) .....	3.50	Amount unknown
Weld all pits in tank plates that are over halfway through tank plates. (Unit: each.) .....	.60	Amount unknown
Tighten and adjust all loose sway rods.....		150.00
Prime and reline interior of tank. ....		650.00



Remove loose rust and paint from exterior of tank and tower and spot prime and re-paint exterior of tower and tank. ....	650.00
Replace catwalk plates where necessary. ....	850.00

Please Give Us Your State Contractor's License Number:  
No. 110607.

In the event total cost exceeds \$500.00, it will be necessary for successful bidder to furnish a Labor and Materials bond covering one half of the total cost of completed job. Bond to be filed with County Purchasing Agent (Government Code Section #4200 of the State of California).

Contractor is to supply all insurance, licenses, permits and fees necessary to complete job.

Please return your bid on this form.

Please type bid number on outside of envelope.

All materials must be American made.

September 4, 1956

We have stated hereon the prices at which we will furnish the articles or services as specified above.

We will make delivery within.....days from receipt of order. Discount will be allowed as follows:.....

DIXIE TANK AND BRIDGE COMPANY,

By /s/ W. A. RILEY,  
President.

Important—Bid should be sealed with Bid Number as shown above, on outside of envelope, and mailed to Glad Bower, County Purchasing Agent, Santa Ana, Calif.

## EXHIBIT C

Request for Bid  
(Not an Order)

Bid No. 6933

Santa Ana, Calif., August 31, 1956

Please quote your lowest prices On This Sheet for the following material, f.o.b. County of Orange Hospital, 12071 Santa Ana Blvd., Orange, California.

No charge will be allowed for package or drayage unless so specified on this bid.

Unit prices, extension and total must be made by bidder.

The right is reserved to reject any or all bids. This sheet must be signed below by bidder.

When bidding on goods other than specified, bidder must state brand quoted on and give catalogue reference.

Bid number must show on outside of bid envelope.

Samples submitted must be tagged with dealer's name.

Bids must be signed by bidder or his agent.

Quotation will be received until September 18, 1956, 10:00 a.m.

Bids will not be accepted unless this sheet is returned with prices thereon.

Labor and material necessary to repair 100,00-gallon high tank as follows:

Articles Required

	Unit Price	Total
Rig, scale and clean inside of tank with scaling machines to clean metal. ....	\$200.00	\$ 200.00
Weld all rusted out rivets. (Each).....	.45	.45
Weld all deteriorated seams. (Per lin. ft.)	2.40	2.40
Weld all pits in tank plates that are over halfway through tank plates. (.45 each)	.45	.45
Tighten and adjust all loose sway rods. (24 @ 8.50) .....	204.00	204.00
Prime and reline interior of tank. ....	200.00	200.00
Remove loose rust and paint from exterior of tank and tower and spot prime and repaint exterior of tower and tank.	325.00	325.00
Replace catwalk plates where necessary...	75.00	75.00
		<hr/> \$1,007.30

Please Give Us Your State Contractor's License Number.

No. 96624C33.

In the event total cost exceeds \$500.00, it will be necessary for successful bidder to furnish a Labor and Materials bond covering one-half of the total cost of completed job. Bond to be filed

with County Purchasing Agent (Government Code Section #4200 of the State of California).

Contractor is to supply all insurance, licenses, permits and fees necessary to complete job.

Please return your bid on this form.

Please type bid number on outside of envelope.

All materials must be American made.

Sept. 18, 1956

We have stated hereon the prices at which we will furnish the articles or services as specified above.

We will make delivery within five days from receipt of order. Discount will be allowed as follows: None.

By /s/ C. R. WAITES,  
Bidder.

Important—Bid should be sealed with Bid Number as shown above, on outside of envelope, and mailed to Glad Bower, County Purchasing Agent, Santa Ana, Calif.

## EXHIBIT D

Form 4-C

Dixie Tank & Bridge Company  
Memphis, Tennessee  
Contract for Cleaning, Scaling,  
Inspecting and Painting

This contract entered into for emergency repairs by and between Authorized Agent, County of Orange Hospital, County Purchasing Department, hereinafter known as First Party and the Dixie Tank & Bridge Company, Memphis, Tennessee, hereinafter known as the Company.

Witnesseth:

1. The Company agrees to do the following described work for First Party on its 100,000 gallon elevated water tank located at Orange, California, to wit:

1. a—Company will rig, clean and scale the inside of the tank, so inspection can be made together with the inspectors of First Party to determine what, if any, repairs are necessary, First Party shall furnish electric current to perform work. Company shall have the right to install outlets in the tank for ventilation and cleaning purposes at our prevailing prices.

1. b—Company will furnish all labor and material to paint the interior of said tank with one (1) coat of Dixie Asphalt Tank Reliner. This paint will pass Federal Government Board of Health tests as being tasteless and non-poisonous, will expand and contract with heat or cold, will not chip, crack or peel, and will resist electrolysis, alkaline, iron or other minerals that are in the water. Water can be put in tank 24 hours after painting. The inside or under side of roof and spider rods are to be painted with exterior paint, one primer coat and one finish coat.

1. c—Company will remove all loose rust and paint from exterior of tank, apply one (1) spot coat to all bare metal, and apply one (1) complete coat of paint to the exterior of tank, tower, riserpipe, all from the foundation up. All exterior paint is to be

furnished by the Company. For the above the Total sum of \$1,850.00 (One thousand eight hundred fifty dollars).

2. After tank has been inspected, Company will submit a flat sum bid for all such repairs as may be necessary. This bid well be submitted to First Party and a written repair contract embodying the specific work to be done, and the entire price to be paid, shall be entered into by the Company and First Party before any repair work is done.

\* \* \*

10. Parties signing this contract in behalf of First Party covenant and agree that they are fully authorized and empowered to sign, seal, deliver and execute the same and that all legal requirements have been fully complied with.

11. No verbal agreements or representations not incorporated in this contract shall be binding on either party as this contract contains the entire agreement.

DIXIE TANK & BRIDGE CO.,

By OFFICE,

Authorized Agent.

This contract must be countersigned by W. A. Riley or E. H. Riley before it is binding on the Company.

/s/ W. A. RILEY,

Pres.



Dated this 21st day of September A. D., 1956.

COUNTY OF ORANGE  
HOSPITAL,

By /s/ WILLIS H. WARNER,  
Chairman Orange County  
Board of Supervisors.

Dated this 2nd day of October AD, 1956. [62]

EXHIBIT E

County of Orange  
Purchase Order

Order No. 62659

Santa Ana, Calif., Oct. 5, 1956.

To: Dixie Tank & Bridge Company,  
P. O. Box 1,  
Memphis 1, Tennessee.

Please Furnish the Following to County of Orange

Ship to:

County of Orange Hospital,  
Maintenance Department,  
12071 Santa Ana Blvd.,  
Orange, California.

Fund: Hospital.

Via Rasmussen

If unable to fill Order exactly in accordance with description,  
unit and price hereon, ask Purchasing Agent for instruc-  
tions.

Labor and material necessary to repair 100,000 gallon high  
tank, as per agreement on file in County Clerk's office, as  
follows:

	Unit Price	Extension
Rig, scale and clean inside of tank with scal- ing machines to clean metal. ....		\$550.00



Weld all rusted out rivets. (Unit: ea.).....	\$ .60
Weld all deteriorated seams. (Unit: per lin. ft.) .....	3.50
Weld all pits in tank plates that are over halfway through tank plates. (Unit: ea.)..	.60
Tighten and adjust all loose sway rods.....	150.00
Prime and reline interior of tank. ....	650.00
Remove loose rust and paint from exterior of tank and tower, and spot prime and repaint exterior of tower and tank. ....	650.00
Replace catwalk plates where necessary. ....	850.00
Your state contractor's license #110607.	

This order is not valid until Labor and Materials Bond covering one-half of the total cost of completed job is filed with the County Purchasing Agent (Government Code Section #4200 of the State of California).

Contractor is to supply all insurance, licenses, permits and fees necessary to complete job.

Bid No. 6933

-----  
Purchasing Agent.

/s/ ERMA GRAHAM,  
Acting P. A.

Purchase Order #62659  
October 5, 1956

## EXHIBIT F

Form 5-C

Dixie Tank & Bridge Company  
Memphis, Tennessee  
Standard Form of Contract for Emergency Repairs  
(For use in all States)

This Contract entered into for emergency repairs to water tanks, by and between Authorized

Agent, County of Orange, Hospital Purchasing Dept., hereinafter known as First Party, and the Dixie Tank & Bridge Company, Memphis, Tennessee, hereinafter known as the Company.

Witnesseth:

It is agreed that any and all contracts between the First Party and the Company prior to the date of this contract are merged into this contract, and this contract supersedes all previous agreements between the parties and is the sole contract between the First Party and the Company.

Inspection

It is understood and agreed between the parties that a thorough inspection has been made of the tank belonging to the First Party and located at Orange, Calif. (excluding the footings or foundation of the tank), and the repairs outlined in the following paragraphs have been agreed upon by the parties as being necessary and essential.

1-(a)—It is understood and agreed between the parties that the Company shall do the following repair work and painting upon said tank for the price hereinafter stated:

Total amount of lineal feet of flat welding, 26.

Total amount of lineal feet of vertical welding,  
152.

Total amount of lineal feet of fingers to be welded in bottom, 180.

Total amount of lineal feet of horizontal welding, 354.

Total amount of rivets to be welded, 3,616.

Total amount of pits to be welded, none.

### Repairs

Tightening of rods, new, steel, etc., or any miscellaneous list below:

Scale clean and paint interior and exterior of tank. Adjust all sway rods. Repair catwalk floor.

### Painting

1-(b)—The Company shall paint the interior of said tank with one (1) coat of Dixie Asphalt Tank Reliner, and also insulate seams and rivet heads on inside of tank. This paint will pass Federal Government Board of Health tests as being tasteless and non-poisonous; will expand and contract with heat or cold; will not chip, crack or peel, and will resist electrolysis, alkaline, iron or other minerals that are in the water. Water can be put in tank 24 hours after painting. The inside or under side of roof and spider rods are to be painted with exterior paints, one primer coat and one finish coat.

1-(c)—The Company shall paint the exterior of the tank, tower, riserpipe, all from the foundation up, with one (1) spot coat and one (1) finish coat of paint. All exterior paint is to be furnished by the

Company. First Party agrees to block off streets, alleys or other areas to prevent automobiles from parking where they might become damaged from falling paint.

### Materials

1-(d)—The Company agrees to furnish all labor, welding rods, and interior paint, necessary under this contract. The First Party agrees to furnish all electric current necessary to perform this contract, and also to furnish replacement steel, exterior paint, and all other materials necessary to perform this contract; but all of such materials which are to be furnished by the First Party shall be subject to approval as to quality by the Company.

### Payment

1—The First Party shall pay to the company, upon completion of the work agreed to be performed, the sum of \$7,511.60, which shall be in full for all work performed and agreed to be performed by the Company under this contract.

### Inspection

3—The Company specifically requests the First Party to have its inspector in the tank at all times while work is in progress, and First Party agrees to notify the Company of any defects in workmanship and if any such defects shall arise while the work is in progress, or during the period of the guarantee hereinafter mentioned; and the Com-

pany agrees to make all proper adjustments within a reasonable length of time after such notice, all such proper adjustments to be without cost from the Company. [64]

\* \* \*

12—The party or parties signing this contract on behalf of the First Party covenant and agree that they are fully authorized and empowered to sign, execute and deliver the same, and that all legal requirements have been fully complied with.

13—No verbal agreements or representations, not incorporated in this contract, shall be binding on either party, as this contract contains the entire agreement. It is agreed that any construction of this contract shall be governed by the laws of Tennessee.

DIXIE TANK & BRIDGE CO.,

By /s/ C. A. LINDSEY,  
Authorized Agent.

This contract must be countersigned by W. A. Riley or E. H. Riley before it is binding on the Company.

.....

Dated this .... day of ..... A.D., 19...

By /s/ WILLIS H. WARNER,  
Chairman, Orange County  
Board of Supervisors.



Dated this 7th day of Nov. A.D., 1956.

Attest:

L. B. WALLACE,

County Clerk and Ex-Officio Clerk of the Board of  
Supervisors.

By /s/ MABEL L. CASTEIX,  
Deputy Clerk. [64-A]

EXHIBIT G

County of Orange  
Change or Cancellation of Purchase Order

Date: November 13, 1956.

Order No.: 62659, 10/5/56.

Department: Hospital.

Dept. Req. No.: M2046A.

To: Dixie Tank & Bridge Company,  
P. O. Box 1,  
Memphis 1, Tennessee.

Note the Following Changes:

Please add the following to the above listed order:

Additional labor and material necessary to  
repair 100,000 gallon high tank.

\$1,011.60.



[Longhand in margin]: Signed agreement following.

[Stamped]: Confirming.

COURTNEY R. CHANDLER,  
Purchasing Agent.

By /s/ ERMA GRAHAM. [65]

## EXHIBIT H

11-21-56.

Mr. Tamura,  
County Counsel's Office,  
W. E. H. Rasmussen.

### Repairs to High Tank

I have inspected the job done by Dixie Tank & Bridge Co., and find they have completed the repairs to my satisfaction, both as to the interior and exterior. I therefore recommend they be paid according to contract.

/s/ W. E. H. RASMUSSEN,  
Sup't. Bldgs. & Grounds. [66]

EXHIBIT I

Dixie Tank & Bridge Company  
Lamar Avenue  
Memphis 1, Tennessee

November 24, 1956.

County of Orange,  
County Purchasing Department,  
P. O. Box 564,  
Santa Ana, California.

Attention: Mr. Clad Bower, Purchasing Agent:

Re: Your 100,000 gallon water tank at Orange  
County General Hospital, Orange, Cali-  
fornia.

Per Purchase Order No. 62659, Dated Octo-  
ber 5, 1956. Scaling, Cleaning and Paint-  
ing Interior and Exterior, Labor & Ma-  
terial .....\$1,850.00  
Welding of 712 feet seams @ 3.50 per lineal  
foot ..... 2,492.00  
Welding of 3616 Rivets @ .60 per rivet ... 2,169.60  
Tighten and adjust all loose Sway Rods .. 150.00  
Replace catwalk plates where necessary ... 850.00  
  
Total .....\$7,511.60

Affidavit of Service by Mail attached.

[Endorsed]: Filed October 18, 1957. [67]

[Title of District Court and Cause.]

ANSWER TO SECOND AMENDED AND  
SUPPLEMENTAL COMPLAINT

Defendants answer the Second Amended and Supplemental Complaint as follows:

First Defense

1. Admit paragraphs I, II and III.
2. Admit the first sentence of paragraph IV, lines 15 through 24 of page 2, of the Second Amended Complaint; in answer to the remainder of said paragraph, admit the allegations thereof insofar as said paragraph alleges Plaintiff and Defendant County entered into two (2) written agreements, one dated October 2, 1956, and one dated November 7, 1956, relating to the cleaning, repair and painting of the tank alleged; [69] deny that any competitive bidding took place; deny there was a series of written contracts for separate prices; deny that there were separate work projects; deny that the Defendant County is indebted to Plaintiff.
3. Deny the allegations of paragraph V.
4. In answer to paragraph VI, deny there were any separate projects.
5. In answer to paragraph VII, admit Defendants take the position that none of provisions of Article 5, Chapter 5, Part 2, Division 2 of Title 3, Government Code of the State of California (Sec-

tions 25450 and following) were complied with; specifically deny any advertising took place for bids regarding any work or material regarding the tank; specifically deny any adoptions of any plans or specifications took place; deny that such a position is a claim of "malfeasance by said Board" or "alleged shortcomings."

6. Deny the allegations of paragraph VIII.

7. In answer to paragraph IX, deny there were any separate work orders or projects.

8. In answer to paragraph XI, deny there were eight (8) work orders or projects, and deny the legal conclusions of such paragraph.

9. Deny the allegations of paragraph XII.

Answering the Purported "Second Cause of Action":

1. Defendants incorporate hereby the admissions, denials and allegations set forth in response to the purported "First Cause of Action." [70]

2. Deny the allegations in paragraphs I, III, V and VI of the purported "Second Cause of Action," except that Defendant Warner signed the alleged contracts.

### Second Defense

The Second Amended and Supplemental Complaint fails to state a claim against Defendants, or either of them, upon which relief can be granted.

Wherefore, Defendants pray for:

1. Dismissal of this action, with costs assessed against Plaintiff in favor of Defendants;
2. Such other relief as the Court may deem just.

Dated: November 4, 1957.

JOEL E. OGLE,  
County Counsel;

STEPHEN K. TAMURA,  
Assistant;

ADRIAN KUYPER,  
Deputy;

By /s/ ADRIAN KUYPER,  
Deputy, Attorneys for De-  
fendants.

Certificate of Service by Mail attached.

[Endorsed]: Filed November 6, 1957. [71]

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[Title of District Court and Cause.]

MOTION AND NOTICE OF MOTION FOR  
JUDGMENT ON THE PLEADINGS AND  
FOR DISMISSAL TOGETHER WITH  
STATEMENT OF THE CASE AND POINTS  
AND AUTHORITIES

Defendants County of Orange and Willis H.  
Warner, move the Court to enter Judgment on the

Pleadings in favor of said Defendants and to dismiss this cause at the Plaintiff's costs for the reason that the Plaintiff in his Complaint, as amended, has failed to state a claim against the Defendants, or either of them, upon which relief can be granted.

Notice Is Hereby Given to Dixie Tank & Bridge Co., and to James C. R. McCall, its attorney.

That Defendants County of Orange and Willis H. Warner will, on November 18, 1957, in the above-entitled Court, at 10:00 o'clock a.m., make this motion.

Dated: November 4, 1957.

JOEL E. OGLE,  
County Counsel;

STEPHEN K. TAMURA,  
Assistant;

ADRIAN KUYPER,  
Deputy;

By /s/ ADRIAN KUYPER,  
Deputy, Attorneys for De-  
fendants. [73]

Statement of the Case and  
Points and Authorities

The events upon which the Complaint is attempted to be founded arose out of work done by the Plaintiff on a high-water tank located on the grounds of the Orange County General Hospital



in the fall of 1956. As shown by the copy of the Minute Order of the Board of Supervisors of the County of Orange, dated August 28, 1956 (part of Exhibit "E" to the Complaint), the original estimate of the job was \$6,500.00. There is no indication that this estimate was ever less than this amount. The estimated cost was increased on or about November 7, 1956, by the amount of \$1,011.60 making a total bill of \$7,511.60, which is the amount finally billed and the amount prayed for in the Complaint.

The Government Code of the State of California by its Section 25450 provides, "whenever the estimated cost of any construction of any \* \* \* public building or the cost of any repairs thereto exceeds the sum of \$4,000.00 \* \* \* the work shall be done by contract. Any such contract not let pursuant to this article is void." (Emphasis added.)

The article referred to requires advertising for bids and adoption of plans and specifications (Sections 25452 and 25451); neither advertising for bids nor adoption of plans or specifications occurred in connection with this job; none is alleged in the Complaint; such action is specifically denied by the Answer.

The California cases construing this act are quite clear that not only is the contract void, but no recovery in quantum meruit is allowed.

Miller v. McKinnon, 20 Cal. 2d 83, 124 P.2d 34, was a taxpayer's action to recover over \$42,000.00

expended by Santa Clara County on repairing a rock quarry. The trial court dismissed the action after sustaining a demurrer to the complaint on the ground that no action was stated. The Supreme Court reversed with directions to overrule [74] the demurrer. The Court stated such contracts as are let without competitive bidding cannot be ratified, that no estoppel to deny their validity can be invoked against the County for entering into contracts without such bidding, that no recovery in quasi contract can be had pursuant to such contracts. The Court also pointed out that persons dealing with any public agency are presumed to know the law with respect to the requirement of competitive bidding and act at their peril. Extensive citations of authority to support these general propositions are found on page 88 of Cal. 2d and page 37 of 124 P.2d. The Court, in addition, stated that the job cannot be split into separate parts as a device for thwarting the public policy declared in the Government Code.

County of San Diego v. California Water and Telephone Company, 30 Cal. 2d 817, 186 P.2d 124, was an action by a County against a utility company to enjoin the completion of a dam on which the company had already spent \$800,000.00, because the work was causing a flooding of a county highway. The utility company alleged the county had abandoned the highway in question and had accepted an easement from the company for another location. The easement contained an agreement that the

company would not be liable for flooding damage to the highway. The Court held the agreement was ultra vires and void. There was no estoppel. The Court stated that neither the doctrine of estoppel nor any other equitable principle may be invoked against a governmental body where it would operate to defeat the effective operation to protect the public.

Nor can Mr. Warner, the Chairman of the Board of Supervisors acting as agent for the County, in signing the various contracts alleged in the Complaint, be held liable:

“When an officer or public agent contracts in good faith with parties having knowledge of the extent of his authority or who have equal means of knowledge, especially where [75] the authority of the officer is prescribed by law, he will not become individaually responsible unless the intent to incur liability is clearly expressed, although it should be found that, through ignorance of the law, he may have exceeded his authority.” (McQuillin 4 Municipal Corporations 163, Section 12.214.) (Emphasis added.)

Certificate of Service by Mail attached.

[Endorsed]: Filed November 6, 1957. [76]

[Title of District Court and Cause.]

PLAINTIFF'S MEMORANDUM ON  
MOTIONS FOR JUDGMENT

Preliminary Statement

For the Court's convenience in comparing the former and present county building or public works statutes of California (formerly Political Code Sec. 4041.18, now Government Code Sec. 25351, Sec. 25450, Sec. 25466) with each other, and with the various doctrines approved in *Miller v. McKinnon*, 20 Cal. 2d 83, 124 Pac. 2d 34, 140 A.L.R. 570 (1942), the pertinent parts of the statutes and opinion are copied at length into appendices attached to this Brief, together with a table tracing the distribution of parts of the Political Code into the Government Code. These attachments are:

Appendix A—Pol. C. Sec. 4041.18 (repealed 1947).

Appendix B—Gvt. C. Sec. 25351, Sec. 25450, Sec. 25466.

Appendix C—Doctrines of implied contract *vel non*.

*Miller v. McKinnon*. [78]

Appendix D—Distribution and Derivation Table.

Comparison of these appendices will show that between 1942 and 1956, through adopting Gvt. C. Sec. 23004 (c), Sec. 25351, Sec. 25450, Sec. 25450.5 and Sec. 25464, the legislature has entirely eradicated

all statutory basis for the harsh doctrine of the 1942 opinion in *Miller v. McKinnon*, *supra*, and restored to county public works contractors in California the humane doctrine of implied liability of a county for benefits received under a void express contract, quoted therein with approval from *Reams v. Cooley*, 171 Cal. 150, 152 Pac. 293, Ann. Cas. 1917A 1260 (1915).

Examination will also show that, through these same new Code sections, the legislature has expressly and/or impliedly authorized the making of public works contracts for smaller, split work orders or projects, free of the competitive bidding requirement, in the smaller counties of the state, including Orange County; and that such authorized splitting is also a modification of yet another former doctrine set forth in *Miller v. McKinnon*, *supra*.

In brief, these new or revised sections of the Government Code vest the county board of supervisors with plenary jurisdiction and general power, not limited expressly to any prescribed mode of procedure, to make contracts for the repair of hospital "buildings" (which includes the high steel water tank in question), together with plenary jurisdiction and general power to determine the "method of payment" therefor, with a prohibition against splitting limited to evasive splitting in counties containing 500,000 population or more. In addition to these changes, the amount of the board's contracting power without competitive bidding, has been increased to cover work projects estimated to cost



up to \$4,000.00. None of this power existed under Pol. C. Sec. 4041.18. It was conferred by the legislature, in the light of, and manifestly to ameliorate, the harsh doctrines of *Miller v. McKinnon*.

In view of these statutory changes since *Miller v. McKinnon*, that opinion lends no support whatever to the county's defense in this case. Rather, in view of those changes, it compels judgment for plaintiff on the pleadings herein.

The county is liable on the contracts, and is also estopped by the [79] warranty of legal compliance in the contracts, which the board approved, from claiming illegality. *Eyer (Geo. A.) Co. v. Mercer County*, 292 Fed. 292 (D.C. Ky. 1923) Affd. 1 Fed. 2d 609.

Freed by the new statute from the former rigid limitations on its power to contract, and vested with extensive new discretion as to methods of payment, etc., the board of supervisors is now charged with the power and duty of determining for itself and others, whether to resort to competitive bidding, the legal requirements for letting a particular contract, and whether it has complied therewith.

It would be extremely difficult or impossible, in view of the new discretion and power, for a contractor to determine such questions accurately, and at his peril, before submitting a bid, invited by the board, for county work. Hence, the county is estopped by the board's representation of full legal



compliance, from asserting its alleged irregularities as a defense here, under the rule laid down at length in *Gunnison County v. E. H. Rollins & Sons*, 173 U.S. 255, 19 S. Ct. 390, 43 L. Ed. 689 (1899).

Orange County is liable to plaintiff or the pleadings, whether or not it advertised for bids or adopted plans and working details, because:

1. The contracts for eight split work projects, each let at a separate price, were perfectly valid under Gvt. C. Sections 23004 (c), 25351, and 25464, since such contracts were exempt from the requirements of Gvt. C. Sections 25450 and 25450.5.

2. The county is also estopped to assert the alleged illegality of its contracts as a defense, because of the warranty of full legal compliance contained in said contracts, under *Gunnison County v. E. H. Rollins & Sons*, and *Eyer & Co. v. Mercer County*, *supra*.

3. It not so estopped, and even if the contracts are void, the county is yet liable to plaintiff in the same amount on implied contract under the humane doctrine of *Miller v. McKinnon*, *supra*, and cases therein cited, in view of the statutory changes.

In the alternative, the defendant Wills H. Warner is liable to plaintiff for a like amount as damages for the breach of his personal covenants in the [80] contracts, under Restatement of Agency, Sec. 332, and 2 Am. Jur. 250, Sec. 318.

The County is also liable to plaintiff for interest on the amount due, under the revised provisions of

California Civil Code Sec. 3287, which authorizes such interest against a county.

### Statement of the Facts

Orange County, California, contains less than 500,000 population. In 1956, the county's elevated steel water tank at the county hospital needed cleaning, repairing and painting. The extent of the welding necessary to make the repairs was unknown and could not be determined until the cleaning had been performed. Hence, working details for the repairs could not be prepared in advance of the cleaning. It was assumed that all the work would cost about \$6,500.00, but no full, legal estimate of the cost could be made until a part of the work had been performed.

In this situation, the Board of Supervisors authorized the County Purchasing Agent to arrange for doing the work in eight smaller work orders or projects, separately priced, as requested by the County Hospital Director.

The purchasing agent solicited bids by mail from five qualified business firms, for doing the eight work projects at separate prices. He received bona fide bids therefor from plaintiff and one other contractor. None of the eight items of work were bid at a figure exceeding \$1,000.00. The welding projects were bid by plaintiff at an item charge of \$0.60 per rivet, or \$3.50 per lineal foot, as required.

On October 2, 1956, plaintiff contracted with the board of supervisors to clean and paint the tank for

\$1,850.00, and to submit a flat-sum bid for the welding, after the required amount thereof should be determined by an inspection by the county, after the cleaning had been done. (Exhibit "D" to complaint, Par. 2.) The contract contained a warranty by the board's chairman that all legal requirements for letting the contract had been fully complied with. This indeed was true, as the total amount of that contract was only \$1,850.00, hence, less than \$4,000.00, and no advertising for bids or adopting of plans was required therefor. [81]

On October 5, 1956, the purchasing agent issued an order to plaintiff covering these and also two repair projects as to which plaintiff had bid flat sums, to wit, tightening and adjusting loose sway rods, \$150.00, and replacing catwalk plates where necessary, \$850.00; total \$,1000.00.

This \$1,000.00, added to the \$1,850.00 cleaning and painting contract of October 2, 1956, did not exceed \$4,000.00 and was well within the contracting power of the board of supervisors.

It was determined after the cleaning, upon inspection by the county, that 3,616 rivets needed welding, which at 60c per rivet, amounted to \$2,169.60. The cleaning also disclosed, upon such inspection, that the tank needed 712 lineal feet of seams welded, which at \$3.50 per lineal foot, amounted to \$2,492.00. These two amounts, added to the previous work orders totaling \$2,850.00, made the total cost of all eight work projects \$7,511.60. This amount was \$1,011.60 more than it had been

previously supposed the eight jobs of work would cost, but none of the individual projects let to plaintiff exceeded the \$4,000.00 contracting power of the board.

On November 7, 1956, the board entered into a written contract with plaintiff for the two welding projects, together with five projects already contracted for and substantially performed. This contract also contained the covenant that all legal requirements for letting the contract had been fully complied with. (Exhibit F, Par. 12.)

The Board also authorized an additional \$1,011.60 for the purchasing agent in arranging for performance of the eight work projects, thereby ratifying his prior order to plaintiff of October 5, 1956.

Plaintiff completed the work under all eight projects, to the county's satisfaction, on November 21, 1956, and submitted its bill therefor on November 24, 1956. (Exhibits "H" and "I" to complaint.)

Not having received payment under any of the contracts for any of the eight work projects, plaintiff on May 18, 1957, presented to the board four verified claims, based respectively on: (1) the three work projects covered by the contract of October 2, 1956, totaling \$1,850.00; (2) the two additional work projects covered by the purchase order of October 5, 1956, totaling [82] \$1000.00; (3) the two welding projects covered by the November 7, 1956, contract, totaling \$4,661.60; and (4) the total value of all the work, \$7,511.60, based on implied contract. The



board of supervisors rejected all four of these claims on May 28, 1957, and this suit is based on that rejection.

The contractual covenants that all legal requirements had been fully complied with in letting the contracts were, in terms, the personal covenants of defendant, Chairman Willis H. Warner, who signed the contracts for the board, under the express authorization from the board of supervisors that he sign those specific contracts containing those specific covenants, on the county's behalf.

The county's answer admits that it has accepted and is using plaintiff's work and does not intend to pay therefor; and that the reasonable value of plaintiff's work equals the contract amounts claimed in this action.

There is no claim nor pretense that there was any fraud or collusion on the part of plaintiff with anyone in securing and performing said contracts.

The county will pay nothing for any part of this work unless compelled to do so by this court.

## Legal Points and Authorities

### I.

#### The County Is Liable on Express Contracts

1. In the absence of some specific charter or statutory provision, municipal contracts need not be let under competitive bidding.

Davis v. City of Santa Ana,  
108 C.A. 2d 669, 239 P. 2d 656 (1952).

Swanton v. Cordy,  
38 C.A. 2d 227, 100 P. 2d 1077 (1940).

2. There is no specific provision in the present county public works act which forbids a county containing less than 500,000 population to split a public work into smaller work orders or projects to avoid the requirements of [83] competitive bidding. The only prohibition on this subject is that in Govt. C. Sec. 25450.5, against evasive splitting in the larger counties. In view of this expressly limited prohibition, under the rule *expressio unius est exclusio alterius*, such splitting is permitted in smaller counties.

23 Cal. Jur.,  
741, Sec. 118, n. 20.

Simth v. Eureka Flour Mills Co.,  
6 Cal. 1, 7 (1856).

Indeed, the new act gives county boards of supervisors general, plenary power to make contracts for the repair of hospital and other public buildings, and to determine the method of payment therefor, unrestricted to any particular mode of contracting. This includes discretion to split a public work into smaller work orders or projects, as conferred by the limited, express prohibition thereof in larger counties.

Govt. C.,  
Sections 23004 (c), 25351, 25450.5, 25464.



3. It is true that on the ground of "public policy," the court in *Miller v. McKinnon*, 20 Cal. 2d 83, 124 P. 2d 34, 140 A.L.R. 570 (1942) inferred a ban on all splitting under the former act. Pol. C. Sec. 4041.18, which act was wholly silent on the subject of splitting. However, the legislature has now expressly determined the limits of the prohibition, and thereby the state's public policy on this subject in Govt. C. Sec. 25450.5, and the judicial extension thereof is not justified.

50 Am. Jur.,  
214-216, Sec. 229.

4. Where a statute enumerates things upon which it is to operate, it is to be construed as excluding from its effect all those not expressly mentioned.

*Shelby v. Southern Pacific Co.*,  
68 C.A. 2d 594, 157 P. 2d 442, 445 (1945).

5. Primarily, it is for the legislature to determine the public policy of the state.

*Building Service Employees Int. Union, Local 262 v. Gazzam*, 339 U.S. 532, 536, 70 S. Ct. 784, 787, 94 L. Ed. 1045 (1949).

*Safeway Stores v. Reail Clerks Int. [84] Assn.*,  
41 Cal. 2d 567, 261 P. 2d 721 (1953).

The paramount public policy is that freedom to contract is not to be interfered with lightly. It is the court's duty to sustain the legality of a contract in whole or in part if it can do so.

Garcelon's Estate,

104 Cal. 570, 38 P. 414, 43 A.S.R. 134, 32 L.R.A. 574 (1894).

Andrews v. Horton,

8 C.A. 2d 40, 47 P. 296 (1935). 12 Am. Jur. 670-671, Sec. 172.

6. As no specific provision of law, and hence no public policy, was violated by the letting in Orange County of eight split work projects, each for a separate price under \$4,000.00, without formal competitive bidding, the tank work contracts were valid. This is certainly true as to the contracts of October 2 and 5, 1956 (Exhibits D and E to complaint) which, with welding expressly excluded as provided in Exhibit D, Sec. 2, covered only \$2,850.00 of work; and the above point of validity is pertinent, primarily, to the last contract, that of November 7, 1956, which included the welding projects.

7. The county itself is liable for interest from November 24, 1956, under the amended statute covering interest.

Civ. C. Sec. 3287.

## II.

The County Is Estopped to Claim the Law Was Violated

1. The Orange County Board of Supervisors had the legal power and discretion to determine the method of payment, and to split and let the tank work, with or without competitive bidding. It had

the legal power and the duty to adopt plans and working details and to advertise for bids, if it should decide to let the work without splitting; and it had the power to reject all bids, and do the work by day's work, if the bids submitted were too high. Finally, and in any event, it had the legal power and duty to determine for itself whether it had met all precedent legal requirements, and, based on its determination, to let the contract, or contracts, for the work. Also, the board has control of the county's defense in this action. [85]

Govt. Code Sections:

1st sentence: 25464, 25450, 25450.5.

2nd sentence: 25451, 25452, 25456.

3rd sentence: 23004 (c), 23005, 25351.

4th sentence: 25021, 25203.

2. Because of its power and duty to determine these matters, and because it would be extremely difficult or impossible for an outsider to ascertain the facts with certainty by normal inquiry, the county is estopped by an affirmative representation by the board that all legal requirements had been fully complied with in letting a public work contract.

Gunnison County v. E. H. Rollins & Sons,  
173 U. S. 255, 19 S. Ct. 390, 43 L. Ed. 689  
(1899).

3. The warranties of full legal compliance, made by the board chairman in executing the contracts of October 2, 1956, and November 7, 1956 (Exhibit D,

par. 10; Exhibit F, par. 12), were representations of the board, because the board had expressly authorized the chairman to sign, on its behalf, these specific contracts containing these specific warranties.

Eyer (Geo. H.) & Co. v. Mercer County,  
292 F. 292 (D. C. Ky., 1923), Aff'd. 1 F.  
2d 609.

4. The county is therefore estopped to claim the contracts are void for the board's alleged misfeasance in failing to properly advertise for bids in a newspaper or to adopt a working detail.

Gunnison County v. E. H. Rollins & Sons,  
*supra*.

### III.

#### The County Is Liable on Implied Contract

1. Under the rule in *Miller v. McKinnon* (Appendix C hereto), a county is liable on implied contract for the value of benefits received under an illegal express contract where:

(a) The board of supervisors is given general power [86] to contract with reference to the subject matter of the express contract;

(b) The manner of entering into the express contract, although irregular, was not violative of a specific statutory restriction on the general power, nor of public policy.

As shown under Point I above, all these conditions are met, in view of the new provisions of the Government Code.

Govt. C.

Secs. 25351, 25450, 25450.5, 25464, and  
23004 (c).

2. Deficient advertising for bids is such an irregularity as permits recovery of the value of benefits received.

*McCormick Lumber Co. v. Highland School District*, 26 C. A. 641, 147 P. 1183 (1915).

(This opinion was distinguished, not overruled, in *Miller v. McKinnon*, and is now a precedent of full vigor.)

3. Plans and working details, which cannot be determined in advance, or would be of no practical value, are not required. (The eight separate work items listed in Requisition M 2946A [Exhibit A to complaint] were sufficient as plans and working details for the letting in this case.)

*City Street Improvement Co. v. Kroh*,  
158 Cal. 308, 110 P. 933 (1910).

35 Cal. Jur.

2d 271, Sec. 478.

*Hodgeman v. City of San Diego*,  
53 C.A. 2d 610, 128 P. 2d 412 (1942).

4. Since bids from five qualified persons were solicited, and there was bona fide competitive bidding, the alleged irregularities in this case were not so grave as to bar relief on implied contract; and, indeed, in view of the broad new discretionary powers of the board of supervisors, there has never



been a reported case in California under which plaintiff would be denied relief against the county on the facts of this case. [87]

#### IV.

### Defendant Warner Is Liable for Breach of Covenant

1. An agent who expressly warrants the capacity of his principal to enter into a contract is liable for breach thereof.

Restatement of Agency, Sec. 332, Comment C.  
2 Am. Jur. 250, Sec. 318, n. 6.

#### Conclusion

The county is liable to plaintiff for \$7,511.60, with interest at 7% per annum from November 24, 1956, to date, on express or implied contract; and, in the alternative, defendant Warner is liable for \$7,511.60.

Respectfully submitted,

/s/ JAMES C. R. McCALL,

Attorney for Plaintiff. [88]

#### Appendix "A"

### Political Code Section 4041.18 (Repealed in 1947)

Powers of Supervisors. Buildings. (1) Under such limitations and restrictions as are prescribed by law, and in addition to jurisdiction and powers

otherwise conferred, the board of supervisors, in their respective counties, shall have the jurisdiction and powers to construct or lease, build or rebuild, furnish or refurnish or repair hospital and almshouse, courthouse, jail, historical museum, aquarium, county free library building, branch library building, art gallery, art institute, exposition building or buildings for exhibiting and advertising farming, mining, manufacturing, livestock raising, and other resources of the county, stadium and such other public buildings as may be necessary to carry out the work of the county government, and to provide all necessary officers, employees, attendants, and supplies for the proper maintenance of the same;

\* \* \*

Construction in Excess of \$500. Whenever the cost of construction of any bridge, wharf, chute, or other shipping facilities, or of any hospital, almshouse, courthouse, jail, historical museum, aquarium, county free library building, branch library building, art gallery, art institute, exposition building or buildings, stadium or other public buildings, or the cost of any repairs thereto or furnishing thereof shall exceed the sum of five hundred dollars, such work shall be done by contract, and any contract therefor shall be void unless the same shall be let as hereinafter provided.

Bids. The board of supervisors shall adopt plans and specification, strain sheets and working details therefor, and must advertise for bids for the per-

formance of the said work in a newspaper of general circulation published in the county. Such advertisement shall be published for at least ten consecutive times in a daily newspaper of general circulation published in the county or for at [89] least two consecutive times in a weekly newspaper published in the county. In case there is no newspaper in said county, then such notice shall be given by posting in three public places for at least two weeks.

Award. All bidders shall be afforded opportunity to examine such plans and specifications, strain sheets and working details, and said board shall award the contract to the lowest responsible bidder, and the person, firm or corporation to whom the contract shall be awarded must perform the work in accordance with the said plans and specifications, strain sheets and working details, unless the same be modified by a four-fifths vote of the members of the board of supervisors; and in every such case if the cost of the work be reduced by reason of the modification, compensation must be made to the county therefor, and the person, firm or corporation to whom the contract shall be awarded must execute a bond to be approved by the said board for the faithful performance of such contract;

Rejection of bids. Provided, that for the construction of any bridge, wharf, chute, or other shipping facilities, or any repairs thereto if the board of supervisors shall be advised by the county surveyor or engineer that the work can be done for a sum less than the lowest responsible bid, it shall then be their

privilege to reject all bids and to order the work done or structure built by day's work, under the supervision and direction of the said surveyor or engineer;

Emergency. Provided, further, that in case of great emergency, by the unanimous consent of the whole board, they may proceed at once to replace or repair any and all bridges and structures without adopting the plans and specification, strain sheets, or working details or giving notice for bids to let contract; the work to be done by day labor under the direction of the board, or by contract, or by a combination of the two; if wholly or in part by contract, the contractor [90] to be paid the actual cost of material and labor expended by him in doing the work, plus not more than fifteen per cent to cover all profits, supervision, use of machinery, and tools, and other expenses; provided, that no more than the lowest current market prices shall be paid for materials;

Purchasing agent. Provided, however, that in counties employing a purchasing agent, furnishings, materials and supplies used in the work mentioned in this subdivision costing not more than two thousand dollars, may be purchased by said purchasing agent in accordance with the provisions of section 4041.13 of this code without the formality of obtaining bids, letting contracts, preparing specifications and doing the other things required by this section for purchases costing more than five hundred dollars. [91]

Appendix "B"

Government Code Sections 25351, 25450-25466

(As amended, when Dixie work was done)

§ 25351. Construction and Repair of Buildings.

The board may construct, lease, build, rebuild, furnish, refurnish, or repair buildings for a hospital, almshouse, courthouse, jail, historical museum, aquarium, art gallery, art institute, exposition building for exhibiting and advertising farming, mining, manufacturing, livestock raising, and other resources of the county, stadium, and such other public buildings as are necessary to carry out the work of the county government. (Added Stats. 1947, c. 424, p. 1115, § 1, as amended Stats. 1951, c. 1681, page 3878, § 1.)

\* \* \*

§25450. Contract for Construction or Repairs

Exceeding \$4,000

Whenever the estimated cost of construction of any wharf, chute or other shipping facility, or of any hospital, almshouse, courthouse, jail, historical museum, aquarium, county free library building, branch library building, art gallery, art institute, exposition building, stadium, coliseum, sports arena or sports pavilion or other building for holding sports events, athletic contests, contests of skill, exhibitions, spectacles and other public meetings, or other public building or the cost of any repairs thereto exceeds the sum of four thousand dollars (\$4,000), in-



clusive of the estimated cost of materials or supplies to be furnished pursuant to Section 25457, the work shall be done by contract. Any such contract not let pursuant to this article is void. (As amended Stats. 1955, c. 327, p. 779, § 2; Stats. 1955, c. 1744, p. 3202, § 1);

§ 25450.4 Exception; Counties of 500,000 or over

In counties containing a population of 500,000 or over, the work referred to in Section 25450 need not be done by contract if the estimated cost thereof is less than four thousand five hundred dollars [92] (\$4,500), exclusive of the estimated cost of materials or supplies to be furnished pursuant to Section 25457. (As amended Stats. 1955, c. 1494, p. 2736, § 1.)

§ 25450.5 Splitting Work Under Contracts  
to Avoid Statute Prohibited

In any county containing a population of 500,000 or over, it is unlawful to split or separate into smaller work orders or projects any public work project for the purpose of evading the provisions of this article requiring public work to be done by contract after competitive bidding. Every person who willfully violates the provisions of this section is guilty of a misdemeanor. (As amended Stats. 1955, c. 1494, p. 2737, § 2.)

§ 25451. Plans and Specifications

The board of supervisors shall adopt plans, specifications, strain sheets, and working details for the work. (Added Stats. 1947, c. 424, p. 1121, § 1.)

§ 25452. Advertisements for Bids; Requisites  
of Publication

The board shall cause an advertisement for bids for the performance of the work to be published for at least 10 consecutive times in a daily newspaper, or for at least two consecutive times in a weekly newspaper, of general circulation published in the county. If there is no such newspaper published in the county, the notice shall be given by posting in three public places for at least two weeks. (Added Stats. 1947, c. 424, p. 1121, § 1.)

§ 25453. Examination of Plans and Specifications

All bidders shall be afforded opportunity to examine the plans, specifications, strain sheets, and working details. (Added Stats. 1947, c. 424, p. 1121, § 1.)

§ 25454. Award of Performance of Contract

The board shall award the contract to the lowest responsible bidder, and the person to whom the contract is awarded shall perform the work in accordance with the plans, specifications, strains, [93] sheets, and working details, unless the contract is modified by a four-fifths vote of the board. (Added Stats. 1947, c. 424, p. 1121.) \* \* \*

§ 25455. Faithful Performance Bond

The person to whom the contract is awarded shall execute a bond to be approved by the board for the faithful performance of the contract. (Added Stats. 1947, c. 424, p. 1121, § 1.) \* \* \*

§ 25456. Rejection of Bids and Performance  
by County

If the board of supervisors is advised by the county surveyor or engineer that any wharf, chute, or other shipping facility can be constructed or repaired for a sum less than the lowest responsible bid, it may reject all bids and order the work done by day's work under the supervision and direction of the surveyor or engineer. (Added Stats. 1947, c. 424, p. 1121, § 1.)

§ 25457. Purchase of Materials Costing Not More  
Than \$2,000 by Counties Employing Purchasing Agent

In counties employing a purchasing agent, furnishings, materials and supplies used in the construction or repair of any of the works mentioned in Section 25450 costing not more than two thousand dollars (\$2,000) may be purchased by the purchasing agent in accordance with Article 7 of this chapter<sup>1</sup> without the formality of obtaining bids, letting contracts, preparing specifications, and the other things required by the article for purchases costing more than two thousand dollars (\$2,000). (Added Stats. 1947, c. 424, p. 1121, § —, as amended Stats. 1947, c. 429, p. 1325, § 1; Stats. 1947, c. 970, p. 2238, § 3.)

\* \* \*

§ 25457.4 Purchase of Materials Costing Not More  
Than \$3,500 in Counties of 500,000 or More  
Population

In counties containing a population of 500,000 or

over and employing a purchasing agent, furnishings, materials and supplies to be used in the construction or repair of any of the works mentioned in [94] Section 25450 and estimated as costing not more than three thousand five hundred dollars (\$3,500) may be purchased by the purchasing agent in accordance with Article 7 of this chapter<sup>1</sup> without the formality of obtaining bids, letting contracts, preparing specifications, or the other things required by this article, and the estimated cost thereof shall not be considered or included in the estimate of the cost of construction for the purposes of Sections 25450 and 25450.4. (As amended Stats. 1955, c. 1494, p. 2737, § 3.)

\* \* \*

#### § 25458. Repair or Replacement of Structures in Emergency: Cost-Plus Contract

By the unanimous consent of the whole board in cases of great emergency, it may proceed at once to replace or repair any and all structures without adopting the plans, specifications, strain sheets, or working details or giving notice for bids to let contract. The work may be done by day labor under the direction of the board, by contract, or by a combination of the two. If the work is done wholly or in part by contract, the contractor shall be paid the actual cost of material and labor expended by him in doing the work, plus not more than 15 per cent to cover all profits, supervision, use of machinery and tools, and other expenses. No more than the lowest current

market prices shall be paid for materials. Added Stats. 1947, c. 424, p. 1121, § 1.)

\* \* \*

#### § 25459. Alteration of Plans

The plans and specifications adopted by the board for the erection, alteration, construction, or repair of any public building or other public structure shall not be altered or changed in any manner which increases its cost, except by a vote of two-thirds of the members of the board of supervisors. (Added Stats. 1947, c. 424, p. 1121, § 1.) [95]

#### § 25460. Alteration of Contract

Whenever the board enters into a contract for the erection, construction, alteration, or repair of any public building or other structure, the contract shall not be altered or changed in any manner, except by order adopted by a vote of two-thirds of the board, and the consent of the contractor. (Added Stats. 1947, c. 424, p. 1122, § 1.)

#### § 25461. Specification of Change

If any change or alteration of the contract is ordered, it shall be specified in writing and the cost agreed upon between the board and the contractor. If the cost so agreed upon:

(a) Does not exceed the amounts specified in Sections 25450 and 25457, or

(b) Does not exceed 10 per cent of the original contract price, the board may authorize the con-



tractor to proceed with the change or alteration without the formality of obtaining bids therefor.

No change or alteration shall be authorized the amount of which is within the limitation specified in subdivision (b) and in excess of the limitation specified in subdivision (a) except by four-fifths vote of the board. (Added Stats. 1947, c. 424, p. 1122, § 1, as amended Stats. 1949, c. 594, p. 1091, § 1; Stats. 1953, c. 1088, p. 2577, § 1.)

#### § 25462. Reduced Cost: Compensation

If the cost of the work is reduced by reason of any modification of the contract, compensation shall be made to the county therefor. (Added Stats. 1947, c. 424, p. 1122, § 1.)

#### § 25463. Extra Work or Material

The board shall not pay or become liable for any extra work done on, or extra material furnished for, any building or structure. (Added Stats. 1947, c. 424, p. 1122, § 1.)

#### § 25464. Determination of Method of Payment

The method of payment for construction contracts shall be determined by the board, including progress payments for completed portions of the work and for materials delivered on the ground or [96] stored subject to the control of the board and unused. (Added Stats. 1951, c. 1233, p. 3078, § 1.)

§ 25466. Changes in Construction Contracts;  
Requisites; Restrictions on Amount

The board of supervisors may, by board order, authorize the county engineer, or other county officer, to order changes or additions in the work being performed under construction contracts. When so authorized, any change or addition in the work shall be ordered in writing by the county engineer, or other designated officer, and the extra cost to the county for any change or addition to the work so ordered shall not exceed five hundred dollars (\$500) when the total amount of the original contract does not exceed fifty thousand dollars (\$50,000), nor 1 per cent of the amount of any original contract which exceed fifty thousand dollars (\$50,000). In no event shall any such change or alteration exceed four thousand five hundred dollars (\$4,500). (Added Stats. 1953, c. 1203, p. 2723, § 1.) [97]

Appendix "C"

Rule Allowing Recover on Quantum Meruit by Contractor When Municipal Corporation's Public Works Contract Is Void for Irregular Procedure in Letting the Same.

Quoted From:

Reams v. Cooley,  
171 Cal. 150, 152 Pac. 293,  
Ann. Cas. 1917A 1260 (1915)

Miller v. McKennon,

20 Cal. 2d 83, 124 P. 2d 34,

140 ALR 570 (1942)

\* \* \*

“Undoubtedly a school board, like a municipal corporation, may, under some circumstances, be held liable upon an implied contract for benefits received by it, but this rule of implied liability is applied only in those cases where the board of municipality is given the general power to contract with reference to a subject matter, and the express contract which it has assumed to enter into in pursuance of this general power is rendered invalid for some mere irregularity or some invalidity in the execution thereof, and where the form or manner of entering into a contract is not violative of any statutory restriction upon the general power of the governing body to contract nor violative of public policy. In the absence of such restriction on the mode or manner of contracting, the same general rule applies to such inferior political bodies as to individuals, and the former will be held responsible on an implied contract for the payment of benefits it receives under an illegal express contract not prohibited by law. This is the effect of the cases cited by appellant and relied on by him. \* \* \* But while the doctrine of implied liability applies where general power to contract on a subject exists and the form or manner of doing so is not expressly provided by charter or statute, the decided weight

of authority is to the effect that, when by statute the power of the board or municipality to make a [98] contract is limited to a certain prescribed method of doing so, and any other method of doing it is expressly or impliedly prohibited, no implied liability can arise for benefits received under a contract made in violation of the particularly prescribed statutory mode. Under such circumstances the express contract attempted to be made is not invalid merely by reason of some irregularity or some invalidity in the exercise of a general power to contract, but the contract is void because the statute prescribes the only method in which a valid contract can be made, and the adoption of the prescribed mode is a jurisdictional prerequisite to the exercise to the power to contract at all, and can be exercised in no other manner so as to incur any liability on the part of the municipality. Where the statute prescribes the only mode by which the power to contract can be exercised, the mode is the measure of the power.” [99]

## Appendix “D”

### Distribution of Political Code in Government Code, and New Sections in the Latter

Political Code Sections material to this case were distributed in the new Government Code in 1947 as follows:

	Pol. C. Sec.	
Subject:	Par. & Sent.	Govt. C Sec.
Power to make contracts.....	Sec. 4003(3)	23004(c)
Contracting agents. ....	.....	23005
	Paragraph (1)	
	Sec. 4041.18	
Jurisdiction to repair. ....	Sent. 1	25351
Competitive Bidding. ....	Sent. 2	25450
Bids: Advertisement, plans. ....	Sent. 3	25451-25452
Award: Bond, altering plans. ..	Sent. 4	25453-25455, 25459-25460, 25463.
Rejection; Emergency. ....	Sent. 5	25456, 25458
Purchasing Agent. ....	Sent. 6	25457

Material new Government Code Sections never in the Political Code are:

Subject:	Govt. C. Sec.
Increased competitive bidding exemption for large counties. ....	35450.4
Splitting prohibited in large counties. ....	25450.5
Determination of Methods of Payment. ....	25464
Payment for extra costs. ....	25466

Affidavit of service by mail attached.

[Endorsed]: Filed November 14, 1957. [100]

[Title of District Court and Cause.]

## NOTICE AND MOTION FOR JUDGMENT ON THE PLEADINGS IN FAVOR OF PLAINTIFF

To the Defendants Above Named and to Their Attorneys:

Notice Is Hereby Given that on December 16, 1957, at 10:00 o'clock a.m. of that day, or as soon



thereafter as counsel can be heard, before the Honorable Leon R. Yankwich, Judge, in the above-entitled Court, plaintiff, Dixie Tank & Bridge Co., will move the Court for a judgment for plaintiff on the pleadings, pursuant to F.R.C.P. Rule 12.

The ground of the motion will be that the answer of the defendants and their admissions of record show that plaintiff is entitled to judgment as prayed. The motion will be based on defendants' admissions of record and plaintiff's memorandum of points and authorities on motions for judgment heretofore filed.

Dated: November 25, 1957.

/s/ JAMES C. R. McCALL,  
Attorney for Plaintiff.

Affidavit of service by mail attached.

[Endorsed]: Filed November 26, 1957. [102]

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[Title of District Court and Cause.]

AFFIDAVIT OF W. A. RILEY  
(On Motions for Judgment)

State of Tennessee,  
County of Shelby—ss.

I, W. A. Riley, on oath, depose and say:

I reside in Memphis, Tennessee, and am the President of Dixie Tank & Bridge Co., the above-

named plaintiff, the office of which is also in Memphis, Tennessee. I have continuously held that office for many years last past, including 1956.

On or about September 1, 1956, I received, as President, at the company's office in Memphis, Tennessee, a "Request for Bid" from the Purchasing Agent of Orange County, California; and, pursuant to the instructions printed thereon (as I understood such instructions), I filled out said Request, as a bid for the company, by inserting therein flat sums, or total prices, for five (5) separate items of work therein listed, and unit or [104] piece work prices for three (3) other separate items of welding work therein listed, the total amount of which welding work was then unknown. After signing this request for bid, so filled out as the Company's bid, on September 4, 1956, I transmitted such bid to the purchasing agent for Orange County, California.

A true copy of this request and bid is attached as Exhibit B to the Second Amended and Supplemental Complaint on file in the above-entitled action. Said Exhibit B is incorporated in this affidavit by this reference. The bid provided:

"We have stated hereon the prices at which we will furnish the articles or services as specified."

The nature of the tank work was such that no total price for all eight (8) separate work items listed in the request, could be computed at that time, since the amount of welding needed was unknown and could not be determined before the

cleaning had been performed. No total price for all the tank work was asked for or computed at that time; and, of course, no total price for all eight items of work was computed or bid by Dixie Tank & Bridge Co. I had no knowledge at the time what welding would be needed; and I had no knowledge or belief that the separation of the total work into eight projects separately listed at separate prices could be deemed legally irregular in any respect, as that is what the request called for.

I submitted this bid in good faith as a competitive bid, believing that the County was requesting competitive bids for the various work items.

Dixie Tank & Bridge Co. has been engaged in the elevated tank repair business for many years, in many different states of the United States. It has prepared, and generally uses, a uniform set of contracts for such work. These form contracts are printed, and copies thereof were used in the Orange County matter. They appear as Exhibits D and F to the Second Amended and Supplemental Complaint on file in the above-entitled action, and as such exhibits, are incorporated in this affidavit by this reference.

The initial contract (Exhibit D) provides only for cleaning, scaling, inspecting and painting a tank for a flat price; and expressly provides that [105] after the cleaning, and inspection by the tank owner's inspectors will be made "to determine what, if any, repairs are necessary," and that:

“After tank has been inspected, company will submit a flat sum bid for all such repairs as may be necessary. This bid will be submitted \* \* \* and a written repair contract embodying the specific work to be done, and the entire price to be paid, shall be entered into \* \* \* before any repair work is done.”

The second contract (Exhibit F) expressly covers the repairs agreed upon, after cleaning and inspection, at a flat sum. It also provides in Paragraph 8 that upon payment for the work on the tank, a written warranty will be issued by the company, warranting the painting for three years and the repair work for twelve years after completion of the work.

These contracts (Exhibits D and F) clearly (and necessarily) divide the work into separate parts at separate prices, to wit, (1) cleaning and painting, and (2) repairing. The business of elevated steel tank repairing could not be rationally, justly and satisfactorily conducted without such separation.

The cleaning, painting and repairing of elevated steel tanks involves the transportation and use at the tank site of much expensive rigging, tooling and machinery. The rental or use of such equipment cannot be compensated for within the restrictive formula for payment for emergency repairs (on a cost-plus 15% basis) specified in Government Code Section 25458; and affiant refused to undertake repair of the Orange County hospital tank as an emergency work on a cost-plus basis, before affiant

received the County's request for bid of September 1, 1956, aforesaid.

At the Orange County Purchasing Agent's request, on September 21, 1956, I signed and sent to said Agent the company's usual cleaning, scaling, inspecting and painting contract, the execution of which was duly authorized by the Board of Supervisors on October 2, 1956. (See Exhibit D to the Second Amended and Supplemental Complaint.) This contract contained a covenant by the executing official that he was authorized to sign the same and that all [106] legal requirements had been fully complied with.

I relied upon this covenant in performing said contract of October 2, 1956.

A similar covenant was a part of the usual form of repair contract which the Board of Supervisors authorized on November 7, 1956. (Exhibit F to the Second Amended and Supplemental Complaint.)

I relied upon this covenant in performing the second contract.

On November 21, 1956, the company had completed all its work on all eight items, and the work had been accepted by the County's representative in charge thereof, who, on that day, recommended that payment be made to the company according to the contract (See Exhibit H to Second Amended and Supplemental Complaint).

A day or two after November 21, 1956, I received, in the form of a letter from the office of the County



Counsel of Orange County, the first intimation of any claim that the Board of Supervisors had acted in any way irregularly in the matter. In this letter, the office of the County Counsel proposed that I sign for the company yet another contract agreeing to do the work on a cost-plus basis as an emergency project under Government Code Section 25458 (which I had previously refused to do), and that the company submit an itemized statement of its actual expenses, excluding anything for the transportation and use of the rigging, tooling and machinery which had been necessarily used in performing the contract, and agree to accept such partial amount of expenses, plus 15% thereon, in full settlement for all the company's work on the tank, limited, however, to \$7,511.60 (which was the total of all of the separate work items covered by the contracts).

The reason for the proposed new and different contract was stated in the letter to be: "The law of California which does not permit the County to perform work of this nature without advertising for bids for the total cost exceeds \$4,000.00, except in cases of great emergency."

Affiant, for the company, rejected this proposal.

Affiant considered and believed, the request for bid to be an "advertising for bids," and affiant's company had bid competitively in [107] response thereto. The company would lose money on the job, on the restrictive payment formula proposed, and

had previously refused to bid for the work on a cost-plus basis. Further, the company, in accepting the work, had relied upon the covenants in the contracts approved by the Board of Supervisors that all legal requirements had been fully complied with. Finally, there is nothing in the California law which prevents the letting of the smaller work projects at separate prices in Orange County, as the Board did in this case, according to affiant's understanding and belief, based on legal advice.

For each of these reasons, affiant refused to sign the proposed new contract, and, due to lapse of time, affiant understands that the company will never receive anything from the County for its work, except through this action for recovery of just compensation on express or implied contract, or through estoppel.

Affiant's company in good faith bid and contracted for, satisfactorily performed, and separately billed the County for separate items of work (Exhibit I), as follows:

Scaling, cleaning and painting interior and exterior of tank, labor and materials . . . .	\$1,850.00
Welding 712 feet seams at \$3.50 per lineal foot . . . . .	2,492.00
Welding 3,616 rivets at \$0.60 per rivet . . . .	2,169.60
Tighten and adjust all loose sway rods . . .	150.00
Replace catwalk plates where necessary . . .	850.00
<hr/>	
Total . . . . .	\$7,511.60

Dated: November 29, 1957.

/s/ W. A. RILEY,  
Affiant.

Sworn to and subscribed before me November 29th, 1957.

[Seal] /s/ H. I. BLOODWORTH,  
Notary Public in and for  
Shelby County, Tennessee.

My Commission Expires Oct. 9, 1960.

[Endorsed]: Filed December 3, 1957. [108]

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[Title of District Court and Cause.]

NOTICE AND MOTION FOR SUMMARY  
JUDGMENT IN FAVOR OF PLAINTIFF  
(F.R.C.P. RULE 56)

To the Defendants Above Named and to Their  
Attorneys:

Notice Is Hereby Given that on December 23, 1957, at 10:00 o'clock a.m. of that day, or as soon thereafter as counsel can be heard, before the Honorable Leon R. Yankwich, District Judge, in the above-entitled Court, plaintiff Dixie Tank & Bridge Co., will move the Court for a Summary Judgment for plaintiff, pursuant to F.R.C.P. Rule 56, and Local Rule 3(d)(2).

The ground of motion will be that there is no genuine issue as to any material fact, and that the

plaintiff is entitled to a judgment against defendant County of Orange, or in the alternative against defendant Willis H. Warner, as a matter of law.

The motion will be based on the entire record on file in the case, and especially on the Second Amended and Supplemental Complaint, the Answer [110] thereto, Plaintiff's Request for Admissions, and the defendants' admissions made pursuant thereto, together with the affidavit of W. A. Riley on file herein; and on Plaintiff's Memorandum on Motions of Judgment.

Plaintiff has served with this Notice, proposed Findings of Fact and Conclusions of Law, and proposed Summary Judgment.

Dated: December 10, 1957.

/s/ JAMES C. R. McCALL,  
Attorney for Plaintiff.

Affidavit of service by mail attached.

[Endorsed]: Filed December 11, 1957. [111]

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[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS  
OF LAW  
(Proposed)

This case came on to be, and was, heard on December ..., 1957, before the Honorable Leon R. Yankwich, on motion of the plaintiff for summary

judgment in its favor, based on the entire record on file herein; and said motion having been argued and submitted by the parties, through their attorneys, and the Court being fully advised in the premises, makes the following

### Findings of Fact

#### I.

Through its Second Amended and Supplemental Complaint, plaintiff Dixie Tank & Bridge Co., a corporation, seeks judgment on contract, both express and implied, against the defendants County of Orange, a California County, and Willis H. Warner, for the agreed and actual value of work performed by plaintiff on a water tank, the property of the County. The County [113] contends that the contracts for the work were ultra vires because of alleged irregularities of its Board of Supervisors in letting the same. Plaintiff (called "Dixie" herein) denies that there were any such irregularities and further contends the County is estopped to rely thereon by reason of covenants of the Board appearing in the contracts, that all legal requirements had been fully complied with. This covenant is made by the persons signing the contracts on behalf of the County; and is the basis of plaintiff's action against defendant Warner, who signed the contracts as Chairman of the Board, by the Board's express authorization. Dixie seeks judgment against Warner personally, for damages for breach of this covenant, in the event that it should be denied



judgment, in whole or in part, against the County because of the Board's asserted irregularities.

## II.

Dixie is a citizen of the State of Tennessee; and the two defendants are citizens of the State of California. The defendant County contains a population of less than 500,000. During 1956 its population was 216,224 as determined by a California Statute, Gov. C., Sec. 28020. Defendant Warner, during 1956, was, and now is, the Chairman of the Board of Supervisors of the County.

## III.

The water tank in question is a 100,000-gallon elevated steel tank, standing on the grounds, and constituting a part of the plant, of the Orange County General Hospital, near Orange, California. In and by a series of three written contracts entered into by the County and Dixie between October 2, 1956, and November 7, 1956, the County employed Dixie to furnish the necessary labor and material, and to clean, repair and paint the inside and outside of the tank, and to tighten and adjust the sway rods and replace catwalk plates, on the tank.

## IV.

The tank work was divided by the County in the contracts, and in the hospital's requisition for the work, and in the County's request for bids, into eight (8) separate projects or items of work, each

to be done and performed [114] for a separate agreed price. These projects and the prices finally agreed upon between the County and Dixie were as follows (an identifying number being assigned to each separate project or work item, for later reference thereto herein), to wit:

Project		Contract
No.	Description of Project	Price
1	Rig, scale and clean inside of tank with scaling machine to clean metal. ....	\$ 550.00
2	Weld all rusted out rivets (3,616 at 60 cents each).	2,169.60
3	Weld all deteriorated seams (712 feet at \$3.50 per foot). ....	2,492.00
4	Weld all pits in tank plates that are over halfway through tank plates (none at 60 cents each).....	
5	Tighten and adjust all loose sway rods. ....	150.00
6	Prime and reline interior of tank. ....	650.00
7	Remove loose rust and paint from exterior of tank and tower, and spot prime and repaint exterior of tower and tank. ....	650.00
8	Replace catwalk plates where necessary. ....	850.00

## V.

Dixie performed all items of work on the tank to the County's satisfaction, completing the same on November 21, 1956; and on that date the County's representative in charge of the work accepted the same for the County and recommended payment by the County of the agreed prices to Dixie. On November 24, 1956, Dixie submitted its bill for the various projects or work items, totalling \$7,511.60, to the County, which on November 21, 1956, re-

ceived, and has ever since been in possession of and using, the cleaned, repaired and repainted tank.

## VI.

The labor and materials furnished by Dixie, and consumed by it in performing the tank work, were of the reasonable worth and value of \$7,511.60; and the reasonable worth and value of the labor and material furnished and consumed by Dixie in performing each of the separate projects [115] or work items was the agreed contract price therefor hereinabove listed.

## VII.

The County, acting through its Board of Supervisors, has failed and refused ever since November 24, 1956, to pay Dixie anything whatever for the work. Dixie unsuccessfully negotiated with the County for payment from November 24, 1956 to May 18, 1957; and on the latter date filed with, and presented to the Board of Supervisors of the County four verified claims for payment for the work. Three of the claims were based on the written contracts therefor; the fourth claim was quantum meruit for the reasonable value of the labor and material furnished in performing the work. On May 28, 1957, the Board of Supervisors denied and rejected each of these four claims, and this action is based on such rejection.

## VIII.

The Board of Supervisors is in control of the County's defense to this action, and it contends in

the answer that the County is not liable to Dixie on either express or implied contract because of the following alleged irregularities of the Board (which the defendants claim were violations of Secs. 25451 and 25452 Gov. C.), to wit:

(1) The Board allegedly failed to "adopt plans, specifications, strain sheets and working details for the work"; and

(2) The Board failed to "cause advertisement for bids for the performance of the work to be published in a newspaper of general circulation published in the county."

These defenses require findings as to the steps by which the contracts were let and performed.

#### IX.

On August 23, 1956, the Director of the Orange County General Hospital filed with the Purchasing Agent of said County Requisition No. M2946A for repair of the tank, divided into the eight projects or work items listed in Paragraph IV above. This Requisition was transmitted by the hospital committee of the Board of Supervisors to the Board, with the recommendation that the Purchasing Agent be authorized "to arrange" for making [116] these specific repairs. On August 26, 1956, the Board, at a regular meeting, unanimously adopted a motion authorizing the Purchasing Agent "to arrange for the repair of the high tank at the Orange County Hospital, as requested by R. D. Powell, Orange County Hospital Director" in said Requisi-

tion. It was estimated that all eight projects would cost about \$6,500.00, but no estimate of the individual projects or work items, was made except that the cost of rigging, scaling, and cleaning the inside of the tank (Project 1 in the above list) was estimated at \$585.00. The amount of welding necessary to repair the tank was unknown and could not be determined until Project 1 had been completed. Later, on November 7, 1956, the Board appropriated an additional \$1,011.60 for the Purchasing Agent, to cover the then ascertained cost of all eight projects or work items, thereby ratifying the Purchasing Agent's "arrangements" made under the authority of August 28, 1956.

## X.

Pursuant to his authority, the Purchasing Agent, on August 31, 1956, mailed a uniform Request for Bid to five contractors, including Dixie, listing therein the eight projects or work items hereinabove described, and requesting unit prices with extension and total price as to each project or work item. The request reserved to the County the right to reject any and all bids; and required that all bids be returned to the Purchasing Agent by September 18, 1956. The names and addresses of the contractors so solicited for bids were as follows:

Pacific Brick & Tank Coating Co., 1051 E. Wardlow Rd., Long Beach, Calif.

Pittsburgh-Des Moines Steel Co., P.O. Box 2012, El Monte, California.



Dixie Tank & Bridge Co., P.O. Box 1,  
Memphis 1, Tennessee.

Pittsburgh Tank & Tower Co., c/o M. C.  
Mattis, 861 S. Palm, Anaheim, California.

West Coast Corrosion Engineering Corp.,  
c/o D. N. Sullivan, Box 1164, Santa Ana,  
California.

## XI.

In response to this solicitation, two bids were submitted, each listing a separate price for each of the eight projects or work items; one bid [117] was by Dixie, and the other was filed by E. R. Waites in response to the solicitation of the Pittsburgh Tank & Tower Co. The Waites bid was withdrawn on September 18, 1956. Dixie's President, W. A. Riley, understood the request for bid as calling for separate bids for each separate project or work item, and in good faith submitted Dixie's bid as a competitive bid on that basis.

## XII.

On September 19, 1956, the Purchasing Agent by letter inquired of Dixie concerning its inspection service and guarantee of tank work for a period of years after its performance thereof. In answer, Dixie signed and forwarded to the Purchasing Agent, on September 21, 1956, a contract for cleaning, scaling and painting the tank, covering Projects 1, 6 and 7 hereinabove listed, for a price of \$1,850.00 (which was the total of its three separate bids for said three projects, to wit, \$550.00,

\$650.00, and \$650.00, respectively). On October 2, 1956, this printed form contract so signed by Dixie was reported to, and placed before, and considered by the Board of Supervisors at a regular meeting thereof, and by unanimous vote the Board adopted a motion to approve that particular contract, and authorized the Chairman of the Board to sign the same, which the Chairman did on the same day. This contract of October 2, 1956, provided that for \$1,850.00, Dixie would rig, clean and scale the inside of the tank for inspection by the County. and that after the tank had been so inspected following such cleaning, plaintiff would submit a flat sum bid for the repairs to the tank, revealed thereby as necessary, and that thereafter a written repair contract for specific repair work, and the entire price to be paid therefor, would be entered into between Dixie and the County before any such repairs would be made. The contract also contained, in Paragraph 10 thereof, the following covenant:

“Parties signing this contract in behalf of first party (the County) covenant and agree that they are fully authorized and empowered to sign, seal, and deliver and execute the same and that all legal requirements have been fully complied with.” [118]

### XIII.

On October 5, 1956, the County Purchasing Agent notified Dixie of the execution of the contract of October 2, 1956, for \$1,850.00, and also sent to Dixie the County's Order No. 62659, which was, in terms, an order for the performance of the eight projects

or work items at the separate prices bid therefor by Dixie, in response to the solicitation for bids. In this Order No. 62659, as well as in Dixie's bid, no contract price was quoted for the welding covered by Projects 2, 3 and 4 above listed, other than the unit prices for welding each rusted-out rivet and deteriorated seam and pit. No total price therefor could be quoted because the extent of such welding was unknown and could not be ascertained until the cleaning had been done. The unit prices of 60 cents each for welding rivets and pits, and \$3.50 per lineal foot for welding deteriorated seams were stated in the bid and the Order of October 5, 1956. This Order had the effect of adding Projects Nos. 5 and 8 above listed, to wit, tightening and adjusting loose sway rods for \$150.00, and replacing catwalk plates where necessary for \$850.00 (total \$1,000.00) to the contract price of \$1,850.00 for the three projects covered by the contract of October 2, 1956, aforesaid; and of leaving for future determination and bidding the doing of the three welding projects or work items.

#### XIV.

Dixie rigged, cleaned and scaled the tank under the contract of October 2, 1956, followed by the County's inspection, which revealed that there were 3,616 rusted-out rivets and 712 lineal feet of seams which needed welding. Dixie agreed to weld these rivets and seams at the unit prices stated in its bid. On November 7, 1956, at a regular meeting of the Board of Supervisors, another contract on a printed form, specifying this number of rivets to be welded

at the agreed blanket price of \$2,169.60, and this number of lineal feet of seams to be welded at the agreed blanket price of \$2,492.00, was presented to, and considered and approved by the Board of Supervisors which, by unanimous vote, adopted a motion authorizing the Chairman to sign this particular contract with Dixie, which was done on the [119] same day. This contract fixed the price for all the work done, or to be done, by Dixie on the tank, at \$7,511.60, which is the total of the various contract prices hereinabove listed, including those prices for the five projects (Projects Nos. 1, 5, 6, 7 and 8) which had theretofore already been contracted for and substantially performed by Dixie for the agreed total price of \$2,850.00. This contract of November 7, 1956, contained in Paragraph 12 thereof the following:

“The party or parties signing this contract on behalf of the first party (the County) covenant and agree that they are fully authorized to sign, execute and deliver the same, and that all legal requirements have been fully complied with.”

#### XV.

On November 13, 1956, Dixie was informed of the Board's execution of the contract of November 7, 1956, and the Purchasing Agent on the same date issued to Dixie a change order for additional labor and material in the sum of \$1,011.60, as authorized by the Board of Supervisors in adopting, on November 7, 1956, another motion which authorized the Purchasing Agent such additional amount. Dixie



thereupon promptly proceeded with and completed all the work, to the County's satisfaction, on November 21, 1956.

#### XVI.

In entering into and performing the contracts, Dixie reasonably believed, and in good faith relied on the covenants contained in the aforesaid contracts of October 2, 1956, and November 7, 1956, that all legal requirements had been fully complied with by the Board; and Dixie would be inequitably and irreparably damaged if the Board and County were now permitted to rely upon and prove the Board's claimed irregularities as a means of enabling the County to avoid paying for Dixie's work. The Board, through and with its Chairman, were the "parties signing this contract on behalf of the County," within the meaning of said covenants.

#### XVII.

The tank work was divided and let to Dixie with the knowledge, [120] consent, approval and participation of the Board of Supervisors in eight smaller projects or work orders. Each was let and performed for a separate agreed price; and Dixie would be inequitably and irreparably damaged if the Board and County were now permitted to contend, as a means of avoiding payment for Dixie's work that, in fact, the eight projects or work items constituted but one project undertaken for a single price. None of said eight projects were estimated to cost, or did cost, more than \$4,000.00.



## XVIII.

The purpose of the Board of Supervisors in authorizing the signing, and in entering into the contracts with Dixie was not to evade the provisions of Article 5, Chapter 5, Part 2, Division 2, Title 3, of the Government Code of California. The work was reasonably, naturally, and necessarily split or divided into smaller work orders or projects because the nature and amount of the welding necessary to repair the tank was unknown, and could not be ascertained, until the cleaning and scaling work had been done. The descriptions of the eight projects approved by the Board in adopting Requisition No. M2946A, were sufficient "plans, specifications, strain sheets, and working details for the work," within the meaning of Government Code Sec. 25451.

## Conclusions of Law

Based on the foregoing Finds of Fact, the Court concludes, as a matter of law:

1. That the Board of Supervisors was vested with power under Government Code Secs. 23004 (c), 23005, 25351, and 25464, to divide or separate the tank repair work into smaller work orders or projects, estimated to cost less than \$4,000.00 each, and to let such smaller work orders or projects to Dixie, without complying with the newspaper advertising, and plans and specification requirements of Government Code Secs. 25451 and 25452; and that such splitting was not prohibited by Government Code Secs. 25450 and 25450.5.

2. That the contracts between Dixie and the County were valid, [121] and not ultra vires.

3. That the County is estopped by the covenants of the Board of Supervisors contained in the contracts with Dixie, executed October 2, 1956, and November 7, 1956, that all legal requirements had been fully complied with, to contend or show that the Board failed to adopt plans and working details or to advertise for bids in a newspaper.

4. That even if said written contracts were invalid for such alleged irregularities of the Board, the County would be, and is, liable to Dixie for the reasonable value of its work, and material, under implied contract; and that such liability is in the same amount as the amount due under the contracts, since the value of the labor and material equalled the contract prices therefor.

5. That the County is liable to Dixie for the sum of \$7,511.60, whether by express or implied contract, or by estoppel, together with interest thereon at the rate of seven per cent (7%) per annum from November 4, 1956, to date of judgment, pursuant to the provisions of Sec. 3287 of the Civil Code of California.

6. That as a member and agent of the Board of Supervisors, defendant Willis H. Warner would be liable to Dixie for breach of the covenant that all legal requirements had been fully complied with, if the defendant County were not liable.

## Directions for Judgment

Let plaintiff's counsel prepare and submit a draft of judgment in favor of Dixie, and against the County, for the sum of \$7,511.60, with interest as aforesaid, and costs, and for judgment dismissing the action as to defendant Willis H. Warner.

Dated: December . . . ., 1957.

.....

United States District Judge.

Lodged: December 11, 1957.

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[Title of District Court and Cause.]

## SUMMARY JUDGMENT

(Proposed)

This cause came on to be, and was heard, on December . . . ., 1957, before the Honorable Leon R. Yankwich, District Judge, in the above-entitled Court, on motion by plaintiff for summary judgment against the defendants; and said motion having been presented, argued and submitted by counsel for the parties, and the Court being fully advised in the premises, and having made and entered its Findings of Fact and Conclusions of Law:

It Is Ordered, Adjudged and Decreed by the Court:

That plaintiff Dixie Tank & Bridge Co. have, and recover of and from the defendant County of

Orange the sum of \$7,511.60 with interest thereon, at the rate of seven per cent (7%) per annum from November 24, 1956 to date hereof, together with plaintiff's costs incurred herein; and that the complaint be dismissed with his costs as to defendant Willis H. Warner.

Dated: December . . . ., 1957.

.....

United States District Judge.

Lodged December 11, 1957. [123]

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[Title of District Court and Cause.]

RESPONSES TO REQUESTS  
FOR ADMISSIONS

State of California,  
County of Orange—ss.

Affidavit

Defendant Willis H. Warner being first duly sworn, deposes and says that the statements made in Plaintiff's "Request for Admissions" are true, not true, or not true in part as follows:

"1. In 1956, Orange County, California, contained a population of less than 500,000; and, by Government Code Section 28020, its population was ascertained and determined to be 216,224."

1. Paragraph 1 is true.

“2. The County Purchasing Agent sent out uniform requests for bids on the tank work to five firms, each request containing the printed and typewritten [124] matter shown on Exhibit C to the Second Amended and Supplemental Complaint, but with nothing in the columns headed ‘Unit Price’ and ‘Total’; and the bidders filled out the matter in those two columns as shown on Exhibits B and C.”

2. Paragraph 2 is true, except that only two bidders responded to the request for bids, as alleged in Plaintiff’s Second Amended and Supplemental Complaint, Paragraph XI, Subparagraph 3.

“3. Dixie Tank & Bridge Co. on or about September 21, 1956, signed the ‘Contract for Cleaning, Scaling, Inspecting and Painting,’ (Exhibit D to the Second Amended and Supplemental Complaint). This contract, so signed by Dixie, was the contract referred to in the minutes of the meeting of the Board of Supervisors of Orange County on October 2, 1956, which minutes are quoted on Page 9 of the Second Amended and Supplemental Complaint; and Chairman Warner signed this specific contract on this same day pursuant to the quoted authority.”

3. Paragraph 3 is true.

“4. The \$1,850.00 contract price fixed in this contract of October 2, 1956, was the total of



the following three items bid for the same work in plaintiff's bid (Exhibit F), and in the County Purchasing Agent's order No. 62659, dated October 5, 1956, to wit:

"Rig, scale and clean inside of tank with scaling machine to clean metal .....	\$ 550.00
"Prime and reline interior of tank	650.00
"Remove loose rust and paint from exterior of tank and tower and spot prime and repair [125] ex- terior of tower and tank.....	650.00
<hr/>	
Total .....	\$1,850.00"

4. Paragraph 4 is true, except the Exhibit is B, not F.

"5. The contract of November 7, 1956 (Exhibit F to the Second Amended and Supplemental Complaint), is the contract referred to in the minutes of the meeting of the Board of Supervisors on November 7, 1956, which minutes are quoted on Page 11 of such pleading; and Chairman Warner signed this contract on the same date, pursuant to this quoted authority."

5. Paragraph 5 is true.

"6. The purpose of the Board of Supervisors in authorizing the signing of the contracts with Dixie Tank & Bridge Co. on October 2, 1956 and November 7, 1956, was not

to evade the provisions of Article 5, Chapter 5, Part 2, Division 2, Title 3 of the Government Code. The purpose was to secure specific bids for specific parts of the work, in order that the County might perform by day's work such parts thereof for which the bids received might be too high, in the opinion of the proper County officials, and to secure piece-work bids for the welding that might be determined to be necessary, after the cleaning had been performed."

6. The first sentence of Paragraph 6 is true. The second sentence of said paragraph is not true.

"7. On October 2, 1956 and November 7, 1956, the Board of Supervisors had before it for consideration, at its regular meetings on those dates, the proposed written contracts (Exhibits D and F, [126] respectively, to the Second Amended and Supplemental Complaint), proposed to be entered into with the plaintiff, and unanimously voted to authorize and direct the Chairman of the Board to execute said specific contracts with plaintiff. Each of these contracts contained a covenant that the person signing on behalf of the County was 'fully authorized and empowered to sign, execute and deliver the same and that all legal requirements have been fully complied with'."

7. Paragraph 7 is true.

"8. The facts alleged in Paragraph XI, Subparagraph 1 of the Second Amended and

Supplemental Complaint are true in all respects.

“9. The facts alleged in Paragraph XI, Subparagraph 2, of said Complaint are true in all respects.

“10. The facts alleged in Paragraph XI, Subparagraph 3, of said Complaint, are true in all respects.

“11. The facts alleged in Paragraph XI, Subparagraph 4, of said Complaint, are true in all respects.

“12. The facts alleged in Paragraph XI, Subparagraph 5, of said Complaint, are true in all respects.

“13. The facts alleged in Paragraph XI, Subparagraph 6, of said Complaint, are true in all respects.

“14. The facts alleged in Paragraph XI, Subparagraph 7, of said Complaint, are true in all respects.”

8. Paragraphs 8 through 14 are true, except, as alleged in this Defendants' answer to the Second Amended and Supplemental Complaint, Paragraph 8, there were not eight separate work orders or projects, and except the legal conclusions in said Paragraphs 8 through 14 of [127] the “Requests for Admissions” are untrue.

/s/ WILLIS H. WARNER.

Subscribed and Sworn to Before Me this 11th day of December, 1957.

[Seal]      /s/ VELDA LOCKETT,

Notary Public in and for Said  
County and State.

My Commission Expires March 28, 1960.

Certificate of service attached.

[Endorsed]: Filed December 12, 1957. [128]

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[Title of District Court and Cause.]

STATEMENT OF GENUINE ISSUES  
IN REPLY FOR SUMMARY JUDGMENT

Defendants set forth herein a statement of the genuine issues in reply to Plaintiff's Motion for Summary Judgment:

1. Whether or not there was one repair job;
2. Whether or not that repair job was estimated to cost \$6500.00;
3. Whether or not there was an adoption of plans and specifications and advertising for bids in conformity with the Government Code of the State of California, Section 25450 and following.

Dated: December 18, 1957.

JOEL E. OGLE,  
County Counsel;

STEPHEN K. TAMURA,  
Assistant;

ADRIAN KUYPER,  
Deputy.

By /s/ ADRIAN KUYPER,  
Attorneys for Defendants.

Certificate of service by mail attached.

[Endorsed]: Filed December 20, 1957. [130]

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[Title of District Court and Cause.]

### DECISION

The various motions of plaintiff and defendants heretofore argued and submitted are now decided as follows:

1. The motion of the plaintiff filed November 26, 1957, for judgment on the pleadings in favor of the plaintiff, pursuant to Rule 12(c), Federal Rules of Civil Procedure, is denied.

2. The motion of the plaintiff filed December 11, 1957, for summary judgment in favor of the plaintiff, pursuant to Rule 56, Federal Rules of Civil Procedure, is denied.

3. The motion of the defendants filed November 6, 1957, for judgment on the pleadings in favor of the defendants and for the dismissal of the sec-



ond amended and supplemental [132] complaint filed October 18, 1957, is granted, with costs to the defendants.

Formal judgment to be prepared by counsel for the defendants.

### Comment

It appears on the face of the pleadings that the contract on which suit is attempted to be brought violates the provisions of Sections 25450, 25451 and 25452 of the California Government Code. Recovery cannot be had upon any theory of implied contract, estoppel or on a quantum meruit, or against the Chairman of the Board of Supervisors personally. (Miller v. McKinnon, 1942, 20 C.2d 83; County of San Diego v. California Water and Telephone Company, 1947, 30 C.2d 817.)

Even assuming that the present provision of Section 25450.5 allows, by implication, the splitting of contracts in counties having less than 900,000 population, the fact is that in this case there was no such splitting. The plaintiff cannot by treating the various types of work as separate contracts, avoid the consequences of the provisions of the California statute which makes the letting of such a contract, without advertisement and without specifications void.

The final contract entered into dated November 7, 1956, called for the work as a whole to be completed at the price of \$7,511.60. The plaintiffs,

themselves, treated the contract as a whole. The mechanics lien executed by them on February 4, 1957, and recorded in the records of Orange County of February 7, 1957, recited:

“Said Lien is claimed for labor and material for cleaning, painting and repairing the elevated water tank aforesaid, done and furnished at the request of Orange County Board of Supervisors, Orange County Purchasing Agent, and Board of Hospital Commissioners, for and used in the work of improvement of said tank between the second day of October, 1956, and the 21st day of November, 1956. That the amount due claimant and unpaid on account of said contract, after deducting all just credits and offsets, is the sum of \$7,511.60, with interest from November 24, 1956.” (Emphasis added.)

The Minutes of the Board of Supervisors under which the contract was executed recited:

“A regular meeting of the Board of Supervisors of Orange County, California, was held November 7, 1956 at 9:30 a.m. The following named members being present: Willis H. Warner, Chairman; C. M. Featherly, Ralph J. McFadden, Wm. H. Hirstein, Heinz Kaiser and the Clerk.

“In Re: Contact for Emergency Repairs—Repair  
High Water Tank Oange County Hospital  
—Dixie Tank and Bridge Company

“On motion of Supervisor Kaiser, duly seconded and unanimously carried, the Chairman was au-

thorized to sign the contract with Dixie Tank and Bridge Company for the repair of the High Water Tank at the Orange County Hospital, in the amount of \$7,511.60." (Emphasis added.)

We realize that the application of these principles in the instant case results in the injustice of having a company which has furnished labor and materials to a county deprived of the value of such labor and materials. Were we free to follow our own ideas of fairness we would adopt the rule enunciated in *Gamewell Co. v. City of Phoenix*, 1954, 216 F.2d 928, 940-941. But this being a diversity case [134] we are bound to follow California law and policy which prohibits recovery under any theory. (See, *Angel v. Bullington*, 1947, 330 U.S. 183, 191; *Sutton v. Leib*, 1952, 342 U.S. 402, 406; *Woods v. Interstate Realty Co.*, 1949, 337 U. S. 535, 538.) In such cases a federal court is "in effect only another court of the state." (*Guaranty Co. v. York*, 1945, 328 U.S. 99, 108.)

Hence the ruling above made.

Dated this 24th day of December, 1957.

/s/ LEON R. YANKWICH,  
Judge.

[Endorsed]: Filed December 24, 1957. [135]

[Title of District Court and Cause.]

PLAINTIFF'S OBJECTIONS TO DEFEND-  
ANTS' PROPOSED DRAFT OF JUDG-  
MENT

Plaintiff, Dixie Tank & Bridge Co., objects to the form of the judgment proposed by the defendants, that is, to the inclusion therein of any new findings, especially the two new proposed findings that the Second Amended and Supplemental Complaint fails to state a claim on which relief can be granted, and that there is no genuine issue as to any material fact.

These two findings should be eliminated from the judgment, because (1) such findings in a judgment are improper; because (2) no such findings are contained in the Court's decision; and because (3) these findings are incompatible with the Court's decision.

The decision, on its face, resolves the evidence on the issue of one contract *vel non* in favor of the defendants; and affirmatively takes into account, as evidence on that issue, a matter which (a) was outside the Second Amended and Supplemental Complaint and the Answer thereto, and (b) was [136] neither presented to nor urged upon the Court by either party as bearing on the motion or motions. This outside matter is the claim of mechanic's lien alluded to as evidence of one contract in the Court's decision.

This reference to the claim of mechanic's lien indicates that the Court resolved the issue of one contract vel non on the merits, and, of course, without a trial.

The defendants' motion for judgment on the pleadings under F.R.C.P. Rule 12(c) was not and could not be based on the alleged failure of the Second Amended and Supplemental Complaint to state a claim on which relief could be granted, because a motion based on that ground must be made before the defendant's answer is filed under F.R.C.P. Rule 12(b); and also because it is provided in both F.R.C.P. Rule 12(b) and 12(c) that if, on a motion under either "matters outside the pleadings are presented to and not excluded by the Court, the motion shall be treated as one for summary judgment and be disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56." This was not done with respect to the claim of mechanic's lien.

The sole ground for summary judgment under F.R.C.P. Rule 56 is that "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact, and that the moving party is entitled to a judgment as a matter of law." Both these conditions must coincide to justify a summary judgment.

Here, the defendants not only did not move for a summary judgment. Instead, they filed a statement



of genuine issues of fact in opposition to plaintiff's motion for summary judgment and to plaintiff's proposed findings of fact and conclusions of law, all of which documents were filed pursuant to Local Rule 3(d)(2); and in this statement, they (the defendants) pointed out the existence of three genuine issues of fact in this case, including the issue of whether or not there was one repair job only, hence one contract *vel non*. It was this "genuine issue" that the Court resolved in the defendants' favor without a trial, by taking into account as evidentiary matter, the claim of mechanic's lien which was outside the present pleadings and not presented to [137] the Court by either party for consideration on the motion.

The three genuine issues of fact pointed out by the defendants were, whether there has been an adoption of plans and newspaper advertising for bids, whether there was one repair job only, and whether this was estimated to cost \$6,500.00. Plaintiff, under the pleadings, deemed these issues genuine, but moved for summary judgment on the ground that they were immaterial as legitimate defenses for either of the defendants, for reasons set forth in the Second Amended and Supplemental Complaint.

The Court decided that at least one of these genuine issues was material as a defense, and then proceeded to decide the issue as though upon a trial; whereas, only a motion for judgment on the pleadings was before the Court on behalf of the defend-

ants. The mere fact that plaintiff was deemed not entitled to a summary judgment did not entitle the defendants to judgment on the pleadings.

Surely, no new findings of fact such as those proposed by the defendants should be inserted in the judgment, as they would be out of place, and incompatible with the Court's decision, which did not include and was not based on any such findings.

Respectfully,

/s/ JAMES C. R. McCALL,  
Attorney for Plaintiff.

[Endorsed]: Filed December 31, 1957. [138]

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In the United States District Court Southern  
District of California, Central Division

No. 597-57—Y

DIXIE TANK & BRIDGE CO., a Corporation,  
Plaintiff,

vs.

COUNTY OF ORANGE, a County of the State of  
California; and WILLIS H. WARNER,

Defendants.

### JUDGMENT

The motion of the Plaintiff, filed November 26, 1957, for judgment on the pleadings in favor of

the Plaintiff, and the motion of the Defendants, filed November 6, 1957, for judgment on the pleadings in favor of the defendants and for dismissal of the Complaint, came on regularly for hearing on December 16, 1957, and the motion of the Plaintiff, filed December 11, 1957, for summary judgment in favor of the Plaintiff, came on regularly for hearing on December 23, 1957, both in Department 7 of the above-entitled Court, before the Honorable Leon R. Yankwich, Judge Presiding; James C. McCall, appearing for Plaintiff, and Joel E. Ogle, County Counsel, and Adrian Kuyper, Deputy County Counsel, by Adrian Kuyper, appearing for Defendants; the matters were argued by Counsel, and submitted for decision; the Court being fully advised, [140] and having considered the pleadings on file herein and the exhibits on file and attached thereto.

Now, Therefore, it appearing to the Court on the face of the pleadings:

That the contract on which suit is attempted to be brought violates the provisions of Sections 25450, 25451 and 25452 of the California Government Code. Recovery cannot be had upon any theory of implied contract, estoppel or on a quantum meruit, or against the Chairman of the Board of Supervisors personally. (Miller v. McKinnon, 1942, 20 C. 2d 83; County of San Diego v. California Water and Telephone Company, 1947, 30 C. 2d 817.)

That even assuming that the present provision of Section 25450.5 of the California Government

Code allows, by implication, the splitting of contracts in counties having less than 900,000 population, the fact is that in this case there was no such splitting. The plaintiff cannot by treating the various types of work and the purchase orders for them as separate contracts, avoid the consequences of the provisions of the California statute which makes the letting of such a contract, without advertisement and without specifications, void.

The final contract entered into dated November 7, 1956, called for the work as a whole to be completed at the price of \$7,511.60.

It Is Ordered for the reasons above stated and pursuant to Rule 12(c) of the Federal Rules of Civil Procedure that judgment be entered in favor of the Defendants and against the Plaintiff. That Plaintiff take nothing against the Defendants or either or any of them by said Complaint and that the Complaint be and the same is hereby dismissed with costs to the defendants.

Dated: December 31, 1957.

/s/ LEON R. YANKWICH,  
Judge.

[Endorsed]: Filed December 31, 1957.

Entered January 2, 1958. [141]

[Title of District Court and Cause.]

## NOTICE OF APPEAL

Notice Is Hereby Given that Dixie Tank & Bridge Co., the plaintiff above named, hereby appeals to the United States Court of Appeal for the Ninth Circuit from the final judgment filed herein on December 31, 1957, and entered in this action on January 2, 1958.

Dated: January 27, 1958.

/s/ JAMES C. R. McCALL,  
Attorney for Appellant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed January 27, 1958. [142]

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[Title of District Court and Cause.]

## APPELLANT'S STATEMENT OF POINTS ON APPEAL

On the appeal in this action, Appellant Dixie Tank & Bridge Co. intends to rely on the following points:

1. The Court erred in granting defendants' motion for judgment on the pleadings.
2. The Court erred in overruling and failing to grant plaintiff's motion for judgment on the pleadings in its favor.



3. The Court erred in overruling and failing to grant plaintiff's motion for summary judgment against the defendants. [144]

\* \* \*

Dated: January 27, 1958.

/s/ JAMES C. R. McCALL,  
Attorney for Appellant.

[Endorsed]: Filed January 27, 1958. [146]

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[Title of District Court and Cause.]

#### CERTIFICATE BY THE CLERK

I, John A. Childress, Clerk of the above-entitled Court, hereby certify that the items listed below constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit, in the above-entitled case:

A. The foregoing pages numbered 1 to 150, inclusive, containing the original:

Complaint, filed 5/7/57.

Amended and Supplemental Complaint, filed 7/22/57.

Answer to Amended and Supplemental Complaint.

Motion and Notice of Motion for Judgment on the Pleadings and for Dismissal, etc., filed 7/30/57.

Affidavit in Support of Motion for Judgment on the Pleadings and for Dismissal.

Minute Order of 9/18/57.

Second Amended and Supplemental Complaint, filed 10/18/57.

Answer to Second Amended and Supplemental Complaint.

Motion and Notice of Motion for Judgment on the Pleadings and for Dismissal, etc., filed 11/6/57.

Plaintiff's Memorandum on Motions for Judgment.

Notice and Motion for Judgment on the Pleadings in Favor of Plaintiff.

Affidavit of W. A. Riley (on Motions for Judgment).

Notice and Motion for Summary Judgment in Favor of Plaintiff.

Proposed Findings of Fact and Conclusions of Law.

Proposed Summary Judgment.

Responses to Requests for Admissions.

Statement of Genuine Issues in Reply for Summary Judgment.

Decision.

Plaintiff's Objections to Defendants' Proposed Draft of Judgment.

Judgment.

Notice of Appeal.

Appellant's Statement of Points and Designation of Record on Appeal.

Appellee's Designation of Portions of the  
Record on Appeal not designated by Appellant.

I further certify that my fee for preparing the  
foregoing record, amounting to \$1.60, has been paid  
by appellant.

Dated: February 7, 1958.

[Seal]                      JOHN A. CHILDRESS,  
Clerk;

By /s/ WM. A. WHITE,  
Deputy Clerk.

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[Endorsed]: No. 15886. United States Court of  
Appeals for the Ninth Circuit. Dixie Tank & Bridge  
Co., a Corporation, Appellant, vs. County of Orange,  
a County of the State of California, and Willis H.  
Warner, Appellees. Transcript of Record. Appeal  
From the United States District Court for the  
Southern District of California, Central Division.

Filed: February 10, 1958.

Docketed: February 12, 1958.

/s/ PAUL P. O'BRIEN,  
Clerk of the United States Court of Appeals for  
the Ninth Circuit.